

1596

JEFFERSON CIRCUIT COURT

DIVISION NINE

BROWN & WILLIAMSON :

TOBACCO CORPORATION, :

Plaintiff, :

vs. : Case No. 95-CI-06560

JEFFREY S. WIGAND :

Defendant. :

Continuation of the videotaped

deposition of Jeffrey S. Wigand, the

Defendant herein, was taken before Special

Commissioner Richard A. Revell, and

reported by Thomas F. Runfola, a

Registered Professional Reporter, pursuant

to notice, at the offices of Middleton &

Reutlinger, 2500 Brown & Williamson Tower,

Louisville, Kentucky, on Monday, November

11, 1996, at 9:00 o'clock a.m.

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<p>1 APPEARANCES</p> <p>2 Middleton & Raulinger 401 South Fourth Avenue 3 2500 Brown & Williamson Tower Louisville, Kentucky 40202 4 By Mr. James E. Millman, and Mr. Henry S. Alford.</p> <p>5 and</p> <p>6 King & Spaulding 191 Peachtree Street 7 Atlanta, Georgia 30303 By Mr. William C. Hendricks, III.</p> <p>8 and</p> <p>9 Chadbourne & Parke 10 30 Rockefeller Plaza New York, New York 10012 11 By Mr. David L. Wallace, and Mr. Bruce G. Sheffield</p> <p>12 and</p> <p>13 Parker & O'Donnell Suite 1540 14 Provident Center 400 West Market Street 15 Louisville, Kentucky 40202 By Mr. Michael J. O'Donnell.</p> <p>16 On behalf of the Plaintiff.</p> <p>17</p> <p>18 Shaw & Gardner 19 1800 Massachusetts Avenue, N.W. Washington, DC 20036 20 By Mr. John D. Aldock and Ms. Laura S. Wertheimer</p> <p>21 On behalf of the Defendant.</p> <p>22</p> <p>23</p> <p>24</p>	<p>1 INDEX</p> <p>2 EXAMINATION</p> <p>3 Page</p> <p>4 Cross By MR. SHEFFLER 1673</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>
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<p>1 ALSO PRESENT:</p> <p>2 U.S. Department of Justice Criminal Division, Fraud Section 3 1400 New York Avenue, N.W. Washington, DC 20033 4 By Mr. Jimmie S. Warren</p> <p>5 and</p> <p>6 Brown & Williamson Tobacco Corporation 7 2600 Weaver Road P.O. Box 1056 8 Macon, Georgia 31290 By Scott Appleton, Ph.D.</p> <p>9 and</p> <p>10 Scruggs, Millietts, Lawson, Borenman & Dent, P.A. 11 P.O. Drawer 1425 Pascagoula, MS 39360 12 By Richard P. Scruggs</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p>1 PROCEEDINGS</p> <p>2</p> <p>3 THE VIDEOGRAPHER: Going on the</p> <p>4 record, the time is approximately 9:21 on</p> <p>5 November 11.</p> <p>6 THE COURT: All right. It's my</p> <p>7 understanding we want to start with Mr.</p> <p>8 Scruggs's remaining arguments first: is</p> <p>9 that correct, counsel?</p> <p>10 MR. MILLIETTS: Yes, your Honor.</p> <p>11 MR. SCRUGGS: Your Honor, if I</p> <p>12 may proceed, Richard Scruggs, I'm here on</p> <p>13 behalf of Dr. Wigand. Since October of</p> <p>14 1995 I have been Dr. Wigand's personal</p> <p>15 counsel. I understand that there were</p> <p>16 three documents that were at issue at the</p> <p>17 last hearing. All three of which I</p> <p>18 prepared, and shared with Dr. Wigand in</p> <p>19 connection with my representation of him</p> <p>20 last year.</p> <p>21 I also am counsel of record for</p> <p>22 the state of Mississippi and a number of</p> <p>23 other states in litigation against Brown &</p> <p>24 Williamson and other tobacco interests</p>

<p>Page 1600</p> <p>1 Two of the three documents that 2 were at issue the last time deal with 3 Brown & Williamson. They deal with my 4 attempts to prepare Dr. Wigand for a 5 deposition and to prepare to defend him 6 with another deposition. One of them is a 7 deposition outline of a Brown & Williamson 8 employee, other than Dr. Wigand, that I 9 prepared and shared with Dr. Wigand in 10 connection with my representation of him.</p> <p>11 At the time these documents were 12 prepared, depositions were -- had been 13 attempted to be taken of Dr. Wigand here 14 in Kentucky, and we were, along with 15 Kentucky co-counsel, preparing to take 16 depositions of Brown & Williamson people.</p> <p>17 Both of the documents at issue 18 that deal with Brown & Williamson were 19 prepared in connection with that effort in 20 Kentucky. And, therefore, I have asked 21 Mr. Aldock to, not to produce those 22 documents to Brown & Williamson because 23 they were prepared by me in connection 24 with my representation of Dr. Wigand.</p>	<p>Page 1600</p> <p>1 case since he is not representing Mr. 2 Wigand in this case. And he has been a --</p> <p>3 THE COURT: I don't think he is. 4 I think Mr. Aldock is claiming it but he 5 wanted to allow Mr. Scruggs to be heard. 6 That's essentially my understanding.</p> <p>7 MR. MILLIKEN: The 8 understanding I have is that Mr. Scruggs, 9 the privilege log shows that the privilege 10 being asserted is not Mr. Aldock's 11 privilege. It's Mr. Scruggs's privilege. 12 And Mr. Scruggs is not representing Mr. 13 Wigand in this case and if he is then he 14 ought to go on the record as representing 15 Mr. Wigand in the Kentucky action, file a 16 motion pro hoc vice, appear and be 17 subject to this court.</p> <p>18 If he is not doing that, then he 19 can't claim privilege in this action. And 20 I think the first thing we have to find 21 out is, who the parties are, who is 22 representing who, who is representing who 23 in connection with what. Then we take 24 each of the three documents. I think there</p>
<p>Page 1602</p> <p>1 MR. MILLIKEN: Judge, at this 2 point I am totally confused. I am 3 absolutely confused. If the -- we had 4 the hearing on the 30th. Our 5 understanding of the documents was that 6 the documents were prepared for a 7 deposition outline in Mississippi that has 8 yet to be taken, and that Mr. Scruggs was 9 not representing Mr. Wigand in that 10 matter.</p> <p>11 Now, we are coming in here and 12 finding out another version that Mr. 13 Scruggs has prepared these in 14 representation for Mr. Wigand in this 15 proceeding.</p> <p>16 And I point, but the work 17 product privilege under the ZPI Shobe 18 case, the Supreme Court said the burden is 19 clearly on the proponent of the privilege 20 to justify the privilege. And I suggest 21 what we do is take each document in issue 22 and have Mr. Scruggs, since it's his 23 privilege, and I don't know how he can 24 assert a privilege for Mr. Wigand in this</p>	<p>Page 1602</p> <p>1 is three documents in issue, and go 2 through and let Mr. Scruggs explain under 3 Shobe versus ZPI or ZPI versus Shobe, 4 exactly why he is claiming a privilege and 5 support the privilege that we will argue 6 that number one, it's been waived if there 7 is indeed a work product privilege; or 8 number two, that we have a need under Rule 9 26 to get that document.</p> <p>10 We are also not sure whether he 11 is claiming work product or 12 attorney-client. When we had the hearing 13 on October 30th it was a work product 14 argument that was being made and I think 15 if the court recalls that.</p> <p>16 MR. SCRUGGS: Your Honor, if I 17 may respond, for a while I was Dr. 18 Wigand's only lawyer; he didn't have 19 counsel of record in Kentucky. This was 20 prior to the fact of Brown & Williamson 21 suing him in Kentucky. I was counseling 22 with him with respect to litigation 23 against Brown & Williamson. Either by 24 Brown & Williamson against him --</p>

<p>Page 1604</p> <p>1 THE COURT: You are saying it 2 was not prepared in anticipation of this 3 litigation, and by this litigation I'm 4 talking about the Kentucky litigation. It 5 was not even pending yet if I understand 6 correctly.</p> <p>7 MR. SCRUGGS: When I first 8 started representing him, it was not 9 pending. When I prepared these documents 10 it was pending and we were finding him 11 counsel in Kentucky.</p> <p>12 THE COURT: The Kentucky case 13 was pending at the time?</p> <p>14 MR. SCRUGGS: Yes, it was, sir.</p> <p>15 THE COURT: All right. So you 16 represented Dr. Wigand. I thought an 17 argument was made that Dr. Wigand was not 18 a litigant to that litigation.</p> <p>19 MR. SCRUGGS: He was not a 20 litigant to the Mississippi litigation. 21 That's correct. He was subpoenaed to be a 22 witness in the litigation. I represented 23 both Mississippi and Dr. Wigand with the 24 mutual consent of both parties.</p>	<p>Page 1605</p> <p>1 document --</p> <p>2 THE COURT: He was a fact 3 witness, not an expert witness, in the 4 Mississippi case; is that correct?</p> <p>5 MR. SCRUGGS: That is correct.</p> <p>6 THE COURT: You were preparing a 7 document, as I understand it to -- with 8 Dr. Wigand's help to assist you in taking 9 the deposition of another fact witness?</p> <p>10 MR. SCRUGGS: No, that's not 11 correct.</p> <p>12 THE COURT: I said that as a 13 statement. I meant it as a question. What 14 was the document prepared for?</p> <p>15 MR. SCRUGGS: The document was 16 prepared to take the deposition of a Brown 17 & Williamson employee.</p> <p>18 THE COURT: As a fact witness?</p> <p>19 MR. SCRUGGS: Well, as a fact 20 witness perhaps and some expert testimony 21 as well but in this case, though. This 22 case was pending then. We were 23 anticipating a short fuse litigation up 24 here mainly because they had tried to take</p>
<p>Page 1606</p> <p>1 MR. WILLIAM: In Mississippi?</p> <p>2 MR. SCRUGGS: Of course.</p> <p>3 THE COURT: You were 4 representing Dr. Wigand in what capacity? 5 If he was not a party to that 6 litigation --</p> <p>7 MR. SCRUGGS: Your Honor, 8 Dr. Wigand was a party to the Kentucky 9 litigation when these documents were 10 prepared. These documents were prepared 11 to help him and his Kentucky counsel in 12 the Kentucky litigation.</p> <p>13 It had -- it had tangential 14 effect in Mississippi but it was prepared 15 for the Kentucky litigation. They had 16 sued him. They were seeking to take his 17 deposition. We were preparing to take 18 depositions of others in Kentucky with his 19 Kentucky counsel.</p> <p>20 I was not counsel of record in 21 Kentucky but that doesn't have anything to 22 do with my representation of him in his 23 Kentucky case.</p> <p>24 MR. WILLIAM: The first</p>	<p>Page 1608</p> <p>1 his deposition on an expedited basis just 2 a few days after they sued him.</p> <p>3 MR. WILLIAM: Number one, I 4 think we need to clear this up. First, 5 Mr. Scruggs said in the Moore deposition 6 that Dr. Wigand is not represented here 7 today. I am not here in the capacity as 8 Mr. Wigand's lawyer for this deposition. 9 That's Mr. Scruggs in the Moore case in 10 Mississippi.</p> <p>11 THE COURT: You are reading 12 from?</p> <p>13 MR. WILLIAM: The transcript.</p> <p>14 MR. SCRUGGS: That's exactly 15 correct.</p> <p>16 MR. WILLIAM: We want to know 17 is Mr. Scruggs representing Mr. Wigand in 18 the Kentucky action. I think we are 19 entitled to yes or no.</p> <p>20 MR. SCRUGGS: Yes, the answer 21 is yes. I'm not counsel of record here, I 22 am his personal attorney. And have acted 23 that way from the beginning.</p> <p>24 MR. WILLIAM: The next thing</p>

1	THE COURT: I think that's been	1	the defendant.	1	thought how it could possibly be claimed as	1	work product in the Moore case, that's not	2	for me to decide. But in order to give	3	you that protection I would think that you	4	could look at it here, in such a -- in	5	other words, it ought to be looked at in	6	camera or in anyway where it doesn't get	7	revealed in the Moore action in	8	Mississippi. Is that still pending?	9	MR. SCHWAB: Yes, sir, it is.	10	WE WERE IN anticipation of litigation.	11	They read with two days later. We knew it	12	was inevitable that they were going to sue	13	and if we were going to sue them in	14	another location.	15	I was consulting with this	16	gentleman as his lawyer at this time.	17	Things were moving fast and furious during	18	that period of time. We anticipated	19	either them suing or our filing suit.	20	They did sue two days later after the	21	letter was prepared.	22	THE COURT: Three days.	23	MR. SCHWAB: Three days.	24	Page 1612
2	MR. WILLIAMS: Right. At this	2	time they were subpoenaing him for the	3	Moore deposition. Remember, this is the	4	time when Mr. Wignand testified, we had a	5	little problem whether Mr. Schwab's law	6	firm was to continue to get it out of	7	him or not. He had to show up here and they flew him	8	back to Mississippi and had him	9	serve at the airport.	10	We contend that was in	11	connection for this deposition and -- or	12	for the Moore deposition. And Mr. Wignand,	13	we have never found out what his capacity	14	was supposed to be, is he an expert,	15	is he a consulting expert, is he a fact	16	witness, is he a neutral witness.	17	THE COURT: I think that's been	18	answered. He was a fact witness in the	19	Moore case in Mississippi.	20	MR. WILLIAMS: Then they don't	21	have any kind of a joint defense	22	privilege. He is a fact witness. That	23	would be like me giving a document to	24	Page 1610						
1	What force, is document BA 150 and I think	2	we need under those to take these	3	documents out at a time and look at them.	4	BA 150 is a letter dated November 18th,	5	1995, when it defects the Kentucky action	6	was filed. Before the Kentucky action was	7	filed.	8	THE COURT: For the record,	9	there is -- between my memory. When was the	10	Kentucky action filed?	11	MR. WILLIAMS: The 11th of	12	November.	13	THE COURT: And this document	14	was prepared on the 11th?	15	MR. WILLIAMS: According to the	16	log it was prepared November 18th, 1995.	17	As a letter requesting information for	18	deposition preparation, signed August 18	19	Michael J. Schwab, recipient address is	20	Jeffrey M. Wignand, and the applicable	21	privilege claimed was work product.	22	THE COURT: It couldn't have	23	been prepared for this litigation because	24	Brown & Williamson is the plaintiff not	1	Page 1611				
1	somebody on the street who is going to be	2	a witness. I subpoena him and I give him	3	a document to review and he is supposedly	4	a neutral witness. That is not a joint	5	interest with them. They can't have it	6	both ways.	7	So, therefore -- and the fact of	8	the matter is Wignand will not have the	9	document. This isn't a deal where he	10	shows him something and come it back. He	11	has it in his possession. If this is Mr.	12	Schwab's work product why does Mr. Wignand	13	continue to have this document in his	14	possession one year later.	15	This isn't something where it's	16	an attorney's notes, mental impressions	17	that he is keeping for himself. This is	18	something for Jeffrey Wignand to use in	19	this deposition, other depositions. It's	20	something to refresh his recollection,	21	something to enhance his testimony. This	22	is not work product.	23	THE COURT: I am inclined to	24	agree with you. I'm trying to think	1	Page 1612				

<p style="text-align: right;">Page 1613</p> <p>1 sorry</p> <p>2 MR. MILLIMAN: Your Honor, the</p> <p>3 point is this is not the Mississippi</p> <p>4 action. If they want to assert the work</p> <p>5 product for Mississippi, that document</p> <p>6 should have been kept in the state of</p> <p>7 Mississippi.</p> <p>8 MR. SCRUGGS: We are not</p> <p>9 asserting that, your Honor. We are</p> <p>10 asserting work product and attorney-client</p> <p>11 privilege for Dr. Wigand. I was his</p> <p>12 personal lawyer, Judge. For goodness</p> <p>13 sake</p> <p>14 My correspondence with him about</p> <p>15 a matter of vital interest to him is</p> <p>16 privileged. I don't know any other way</p> <p>17 around that. I was his lawyer. I had</p> <p>18 been his lawyer for a month at that time</p> <p>19 in this case in any potential case</p> <p>20 against Brown & Williamson that involved</p> <p>21 his rights.</p> <p>22 MR. MILLIMAN: If it's</p> <p>23 attorney-client, they did not -- when they</p> <p>24 asserted their privilege log they did not</p>	<p style="text-align: right;">Page 1615</p> <p>1 MR. SCRUGGS: Judge, it is</p> <p>2 both. I didn't prepare this privilege</p> <p>3 log, I didn't prepare this. However, it</p> <p>4 is both work product and attorney-client</p> <p>5 privilege. This is a correspondence</p> <p>6 between me and my client three days before</p> <p>7 he is sued and everyone knew they were</p> <p>8 going to sue him. This thing was hot and</p> <p>9 furious during that period of time.</p> <p>10 I can't think of anything that's</p> <p>11 more protected than that sort of</p> <p>12 communication.</p> <p>13 THE COURT: I don't get the</p> <p>14 feeling that it's attorney-client</p> <p>15 privilege because, as I understand it, you</p> <p>16 prepared it not as advice to client but in</p> <p>17 anticipation of Dr. Wigand -- I assume</p> <p>18 getting Dr. Wigand's input in helping to</p> <p>19 form questions to take the deposition of</p> <p>20 another witness.</p> <p>21 MR. SCRUGGS: No, that's not</p> <p>22 correct, your Honor.</p> <p>23 THE COURT: I thought that's</p> <p>24 what you said a minute ago</p>
<p style="text-align: right;">Page 1614</p> <p>1 assert attorney-client privilege with</p> <p>2 respect to this document. They asserted</p> <p>3 work product privilege.</p> <p>4 Now we are coming in here when</p> <p>5 they find out they -- we argued work</p> <p>6 product on October the 30th. That was the</p> <p>7 whole basis of the hearing on October 30th</p> <p>8 was the work product. Now, when they know</p> <p>9 they don't have work product -- and we got</p> <p>10 a different version then.</p> <p>11 Now, I'm not blaming Mr. Aldock</p> <p>12 because he wasn't involved in that. We</p> <p>13 got a different version then than we are</p> <p>14 getting now. And now Mr. Scruggs comes up</p> <p>15 here and says now it's attorney-client</p> <p>16 privilege.</p> <p>17 MR. SCRUGGS: This is the first</p> <p>18 time I have been here, your Honor, and I</p> <p>19 am very sorry, I had a conflict.</p> <p>20 THE COURT: That's the first</p> <p>21 time it's been mentioned this morning.</p> <p>22 too. I mean, you have gone through the</p> <p>23 work product argument and when I was</p> <p>24 leaning towards Mr. Milliman's --</p>	<p style="text-align: right;">Page 1616</p> <p>1 MR. SCRUGGS: No, it's not.</p> <p>2 There were two documents. The one that we</p> <p>3 are talking about now, the letter, had</p> <p>4 nothing to do with another witness. It had</p> <p>5 solely to do with Dr. Wigand.</p> <p>6 THE COURT: Let's take a</p> <p>7 document at a time.</p> <p>8 MR. SCRUGGS: The first document</p> <p>9 is a one-page letter from me to</p> <p>10 Dr. Wigand, if I remember correctly, dated</p> <p>11 I think November the 18th. I had been</p> <p>12 representing him since sometime in late</p> <p>13 October.</p> <p>14 THE COURT: I think I need to</p> <p>15 see it.</p> <p>16 MR. SCRUGGS: I respectfully</p> <p>17 decline. And I'm going to have --</p> <p>18 THE COURT: I can't rule on it</p> <p>19 because you say you are not his attorney</p> <p>20 here in this action.</p> <p>21 MR. SCRUGGS: I meant not his</p> <p>22 attorney of record. I meant representing</p> <p>23 him and give him advice of counsel.</p> <p>24 THE COURT: That's why I need to</p>

<p>Page 1617</p> <p>1 see it. I don't see how anybody, myself 2 or an appellate court, could answer that 3 without seeing the document to see what 4 the correspondence is. If it's privileged 5 and it gets out -- if are you are his 6 attorney -- 7 MR. SCRUGGS: This is really 8 involving, your Honor, with all respect 9 into the theater of the absurd. This 10 company is claiming every single document 11 it has a privileged. A lawyer said it's 12 was privileged. Now they come along with 13 communication between me and my client -- 14 THE COURT: I see nothing absurd 15 about having legal arguments and 16 requesting a document. They made a motion 17 for the production of a document and you have 18 objected. And the burden is on you. And 19 if I can't see the document I cannot make 20 an intelligent ruling on it. I'm sorry. 21 I don't see how anybody could. 22 MR. SCRUGGS: I set forth the 23 circumstances of the document being 24 prepared, your Honor. That's the best I</p>	<p>Page 1619</p> <p>1 document 2 MR. WILLIAMS: I would ask you 3 to produce the document to Judge Revell as 4 Mr. Wigand's counsel of record in this 5 case. 6 MR. ALDOCK: We are under 7 instructions by counsel, we can't do it. 8 We can't do it while we are under 9 instructions by counsel not to produce it 10 MR. SHEFFLER: Produce it in 11 camera. You are refusing to produce it in 12 camera, I just want to make clear. 13 THE COURT: Bruce, you started 14 to say something and I interrupted you 15 MR. SHEFFLER: No, that's fine. 16 Judge, I'm just confused. 17 MR. ALDOCK: Ma, your Honor, are 18 the stake holder of this privilege. It is 19 a privilege between this lawyer and his 20 client. We happen to have it so we are 21 the stake holder. I don't think we can 22 produce it. We have it in the hotel, we 23 don't have it with us. We have it back 24 there.</p>
<p>Page 1618</p> <p>1 can do. 2 MR. WILLIAMS: I will go on 3 record right now saying we are going to 4 file a motion to hold Jeffrey Wigand in 5 contempt of court for refusing to produce 6 a document. 7 This is -- Shobe versus EPI of 8 the Supreme Court of this state requires 9 him to do this. And he won't do it. And 10 he has said he is Jeffrey Wigand's lawyer. 11 And I submit that that subjects Jeffrey 12 Wigand to yet another third contempt 13 motion. 14 THE COURT: Well, you say here 15 this morning you are his attorney. In the 16 record it says you aren't his attorney. 17 You say that it's privileged. I can't 18 make a ruling upon that without seeing the 19 document. You have not met the burden, 20 I'm sorry. 21 MR. WILLIAMS: We would ask John 22 Aldock -- 23 MR. ALDOCK: If we are in error 24 on the law I apologize. It wasn't our</p>	<p>Page 1620</p> <p>1 THE COURT: I'm not sure what 2 you mean by the stake holder because if 3 you have it -- if you are saying it's 4 privileged and nobody else can see it, 5 it's no longer -- the privilege has been 6 broken at least to the extent you have it. 7 MR. ALDOCK: I'm counsel. He is 8 his counsel in personal matters, and in 9 the -- and he was the counsel preceding 10 me in this action. I'm now counsel in 11 this action. So it's -- certainly sharing 12 it with me is not waiving it. 13 THE COURT: Now, when you say he 14 was counsel of record in this action 15 preceding you, that's not the way I 16 understood it. 17 MR. ALDOCK: No, sir, counsel 18 for Dr. Wigand in this action preceding 19 before it was filed in anticipation of 20 this action. He was the only lawyer he 21 had. 22 MR. WILLIAMS: Frank Bohney 23 represented Jeffrey Wigand in this case on 24 record and so did Mr. Johnson out of</p>

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<p>1 Frankfurt on record prior to Mr. Aldock</p> <p>2 Mr. Scruggs has never appeared in this</p> <p>3 case or record</p> <p>4 Now he says he is counsel for</p> <p>5 Mr. Wigand in this case. He has never</p> <p>6 appeared on the record. Mr. Wigand has</p> <p>7 been represented by counsel from day one.</p> <p>8 MR. SCRUGGS: Your Honor, that's</p> <p>9 not true. Mr. Milliman does not know</p> <p>10 where or he speaks. I represented</p> <p>11 Dr. Wigand from day one. Mr. Doherty came</p> <p>12 in after the fact. I retained Mr. Doherty</p> <p>13 for Dr. Wigand in this case, as my</p> <p>14 pro-counsel. Because I was not counsel of</p> <p>15 record in this case does not mean I was</p> <p>16 not his lawyer in connection with matters</p> <p>17 dealing with this case.</p> <p>18 THE COURT: You can be on all</p> <p>19 you want. I have already answered it.</p> <p>20 You made the statement in the Moore case</p> <p>21 that Dr. Wigand was appearing without</p> <p>22 counsel, he was unrepresented.</p> <p>23 MR. SCRUGGS: He was in that</p> <p>24 deposition in the Moore case</p>	<p>1 one-page letter. The second document is a</p> <p>2 question outline for a witness, a Brown &</p> <p>3 Williamson employee, that I prepared with</p> <p>4 my colleagues and shared it with</p> <p>5 Dr. Wigand in connection with this case.</p> <p>6 It was long after this case had been</p> <p>7 pending.</p> <p>8 MR. MILLIMAN: I believe that's</p> <p>9 document 160. I'm not sure of the number.</p> <p>10 THE COURT: What was the number?</p> <p>11 MR. ALDOCK: 135.</p> <p>12 THE COURT: What was the number</p> <p>13 of the first one?</p> <p>14 MR. WALLACE: 150 was the first</p> <p>15 one.</p> <p>16 MS. WERTHEIMER: Jim I think it's</p> <p>17 135.</p> <p>18 MR. MILLIMAN: The first one?</p> <p>19 MR. ALDOCK: The second one.</p> <p>20 MS. WERTHEIMER: The letter is</p> <p>21 PA 130, we are now on PA 135. It was the</p> <p>22 document that Mr. Scruggs --</p> <p>23 THE COURT: Mr. Scruggs, tell us</p> <p>24 about this one. This is the one prepared</p>
Page 1622	Page 1624
<p>1 THE COURT: Now, you are telling</p> <p>2 me that you were his attorney. So you are</p> <p>3 either making a misstatement here in this</p> <p>4 action or you made a misstatement in the</p> <p>5 Moore action. The document you say is</p> <p>6 advice to him. It may be but I cannot</p> <p>7 absorb that through my mind without seeing</p> <p>8 it.</p> <p>9 And until I see the document the</p> <p>10 motion to produce is sustained, the</p> <p>11 objection is overruled. In other words,</p> <p>12 you have not met the burden. It's not</p> <p>13 work product for this case. It may be</p> <p>14 privileged communication to a client but I</p> <p>15 can't answer that without seeing it.</p> <p>16 I know of no way that anybody --</p> <p>17 The Supreme Court of the United States</p> <p>18 couldn't answer it without seeing the</p> <p>19 document.</p> <p>20 MR. SCRUGGS: All right, sir.</p> <p>21 That's one document. The second document</p> <p>22 was prepared --</p> <p>23 THE COURT: That's the letter.</p> <p>24 MR. SCRUGGS: That's the</p>	<p>1 in anticipation of taking the deposition</p> <p>2 of another witness; is that correct?</p> <p>3 MR. SCRUGGS: Yes, it is,</p> <p>4 that's correct.</p> <p>5 THE COURT: And this was</p> <p>6 prepared by whom? By Dr. Wigand or by</p> <p>7 you?</p> <p>8 MR. SCRUGGS: Mostly by me.</p> <p>9 MR. MILLIMAN: Judge, this is PA</p> <p>10 135 on the privilege log. It is dated</p> <p>11 April 12, 1996. The description is a</p> <p>12 deposition outline in another case. The</p> <p>13 sender author is Richard F. Scruggs and it</p> <p>14 does not have a recipient addressee. The</p> <p>15 applicable privilege is listed as Scruggs.</p> <p>16 Again, this has to be a work</p> <p>17 product privilege because if it is</p> <p>18 attorney-client privilege the privilege</p> <p>19 belongs to Mr. Wigand and not Mr. Scruggs.</p> <p>20 So I am presuming this is another work</p> <p>21 product privilege argument.</p> <p>22 MR. SCRUGGS: Again, I didn't</p> <p>23 prepare this privilege log, your Honor. I</p> <p>24 hadn't seen it before fairly recently in</p>

<p>Page 1625</p> <p>1 terms of how it was defined.</p> <p>2 MR. MILLMAN: I think what we</p> <p>3 want to know, we initially thought that</p> <p>4 was a deposition outline for Wigand and</p> <p>5 the date was after the Moore deposition.</p> <p>6 So we need to know what case this outline</p> <p>7 is privileged for. Is it for Moore or is</p> <p>8 it for this case and of who, what other</p> <p>9 case is it?</p> <p>10 I repeat, they have the burden</p> <p>11 of establishing the privilege.</p> <p>12 THE COURT: Go ahead, Mr.</p> <p>13 Scruggs.</p> <p>14 MR. SCRUGGS: I have nothing to</p> <p>15 say other than what I have already said.</p> <p>16 your Honor. I prepared this deposition</p> <p>17 outline. It is clearly work product by me</p> <p>18 in connection with Dr. Wigand's case in</p> <p>19 Kentucky. There is nothing more I can say</p> <p>20 about it.</p> <p>21 MR. SHEFFLER: Can I ask a</p> <p>22 question, Judge?</p> <p>23 THE COURT: Sure.</p> <p>24 MR. SHEFFLER: The log indicates</p>	<p>Page 1625</p> <p>1 MR. ALDOCK: I think it's</p> <p>2 unfair. We prepared this under a lot of</p> <p>3 pressure, this outline. We put this work</p> <p>4 product, this privilege log together. We</p> <p>5 did the best we could. Mr. Scruggs -- and</p> <p>6 we got some things wrong. That happens.</p> <p>7 And Mr. Scruggs comes in, and he</p> <p>8 says that the document was prepared for</p> <p>9 this case, not another case.</p> <p>10 MR. SHEFFLER: Is that true?</p> <p>11 That's what I am unclear on.</p> <p>12 MR. SCRUGGS: It was prepared</p> <p>13 for this case.</p> <p>14 MR. SHEFFLER: If it's a</p> <p>15 deposition outline prepared for this case</p> <p>16 and it was given -- and Mr. Aldock has had</p> <p>17 a chance to review it and Mr. Aldock</p> <p>18 obviously didn't think it was protected</p> <p>19 for this case, and he is counsel of record</p> <p>20 for this case, since he listed it as a</p> <p>21 deposition outline for another case.</p> <p>22 So it seems to me -- that</p> <p>23 although Mr. Aldock -- I appreciate he</p> <p>24 prepared this under some pressure and I</p>
<p>Page 1626</p> <p>1 clearly that the deposition outline was</p> <p>2 prepared for another case. And if indeed</p> <p>3 it was prepared for another case, I think</p> <p>4 we need to have at least the identity of</p> <p>5 the other case. I don't see how that</p> <p>6 could be possibly subject to work product</p> <p>7 protection or whatever.</p> <p>8 At least we should have the</p> <p>9 identity of the case listed here. And as</p> <p>10 I understand it now, the deposition</p> <p>11 outline is prepared to address Mr.</p> <p>12 Wigand's deposition, at least in part, I</p> <p>13 think that was Mr. Scruggs's</p> <p>14 representation.</p> <p>15 The only other case that I am</p> <p>16 aware of that Mr. Wigand was to give</p> <p>17 testimony in was the Moore case. As we</p> <p>18 have heard he was a fact witness in that</p> <p>19 case, as we heard Mr. Scruggs did not</p> <p>20 represent him in that in that case.</p> <p>21 Therefore, I don't see where the privilege</p> <p>22 protection would attach to the document.</p> <p>23 But, we don't have enough information</p> <p>24 obviously.</p>	<p>Page 1626</p> <p>1 appreciate that he may not have been aware</p> <p>2 of what Mr. Scruggs was thinking or not</p> <p>3 thinking, the point of the matter is, Mr.</p> <p>4 Aldock reviewed it, found that it wasn't a</p> <p>5 deposition outline for this case, but it</p> <p>6 was a deposition outline for another case.</p> <p>7 And therefore, it shouldn't be any work</p> <p>8 product protections attached.</p> <p>9 He is the lawyer, Mr. Aldock,</p> <p>10 who represents Mr. Wigand in this case and</p> <p>11 at this deposition. And he is the lawyer,</p> <p>12 Mr. Aldock, who has prepared Mr. Wigand</p> <p>13 for this case and for this deposition.</p> <p>14 And, therefore, if it's not -- if Mr.</p> <p>15 Aldock is the lawyer who is in charge of</p> <p>16 all that finds that it's not a deposition</p> <p>17 outline for this case, I think at least</p> <p>18 the document should be produced in camera</p> <p>19 to address it and see if it is or isn't.</p> <p>20 MR. ALDOCK: Your Honor, we made</p> <p>21 a judgment based on looking at the</p> <p>22 documents. We got it wrong. The man who</p> <p>23 knows was his lawyer. He preceded us in</p> <p>24 this case. He says it's a privileged</p>

<p>Page 1619</p> <p>document. He says he knows what he prepared it for. I didn't know what's he prepared it for. I took a guess. I got it wrong.</p> <p>That can't be that that's dispositive. And by putting Mr. Scruggs there we are not saying that it's not attorney-client privilege. We are saying that he is the guy that holds the privilege. We are the stake holder. We didn't know how the document was prepared and we didn't know what it was prepared for. We logged it. That's what we felt it was our obligation to do.</p> <p>THE COURT: I don't mean this critically but I'm not overly impressed by saying it was done under pressure. Everything done in preparation of a trial is done under pressure, and I have difficulty with you all -- and, John, I mean by that you and Laura preparing objections and tying it on something and then somebody else coming in and arguing it. I really have great difficulty with</p>	<p>Page 1620</p> <p>the case is clear. Mr. Wigand has testified that Mr. Scruggs never represented him in this case. That's very clear testimony in the record. Therefore, we didn't -- let me finish.</p> <p>MS. WERTHEIMER: I think you interrupted me.</p> <p>MR. SHEFFLER: I thought you were done. I'm sorry.</p> <p>MS. WERTHEIMER: My point was two-fold. One, it hadn't been challenged; and two, what I believe the testimony is, it's a little different than the characterization you made. I think Mr. Scruggs has said, I, Richard Scruggs am not counsel of record in this case. I don't think there is any dispute about that. I'm not suggesting for a moment that he has entered an appearance in Kentucky.</p> <p>THE COURT: Did Dr. Wigand -- and maybe it went over my head, I may not have realized the importance of it -- back in -- was it in August when we started</p>
<p>Page 1630</p> <p>that.</p> <p>MR. ALDOCK: It's his privilege, your Honor, it's his document. We happen to hold the document that his former lawyer gave to him. We have to log it. We have no choice but it's not our document.</p> <p>THE COURT: It's whose privilege? Here is the client --</p> <p>MS. WERTHEIMER: Your Honor, if I might for a moment. The privilege here runs between Mr. Scruggs and Dr. Wigand. Mr. Scruggs was retained by Dr. Wigand in a retention letter that's on this log in October of '92 to represent him in connection with actions that might be filed by B & W.</p> <p>THE COURT: You are telling me something new. You say there is a letter?</p> <p>MS. WERTHEIMER: There is a retention letter on this log. That's not not challenged by Brown & Williamson.</p> <p>MR. SHEFFLER: Well, it's going to be challenged now. The testimony in</p>	<p>Page 1632</p> <p>this?</p> <p>MR. SHEFFLER: July, your Honor.</p> <p>THE COURT: July. Just seems like August. I may need -- would it be possible to have that read back? You are saying Dr. Wigand testified in response to a question that Mr. Scruggs never represented him in this action?</p> <p>MR. SHEFFLER: Yes.</p> <p>THE COURT: He was never his attorney? Would that be possible to find that on the record? Would you have that this morning?</p> <p>THE REPORTER: The lawyers I believe have it, your Honor.</p> <p>THE COURT: Obviously.</p> <p>MR. WALLACE: Page 46, line 10 through page 47 line 13, he testified, and I'm just summarizing, I don't have the actual transcript, that he does not have any other attorneys representing him in this action other than John Aldock and Laura Wertheimer.</p> <p>THE COURT: That's not</p>

<p>Page 1633</p> <p>1 sufficient. That doesn't answer it. I</p> <p>2 don't think. That's correct. the record</p> <p>3 itself shows --</p> <p>4 MR. ALDOCK: Your Honor, we</p> <p>5 don't have the retention letter with us</p> <p>6 but we could get it. It's at our office.</p> <p>7 There is no doubt he was retained in the</p> <p>8 case.</p> <p>9 MR. SHEFFLER: In this case?</p> <p>10 MR. ALDOCK: To be his attorney</p> <p>11 prior to the filing when he had no other</p> <p>12 lawyer.</p> <p>13 MR. SHEFFLER: We have heard his</p> <p>14 testimony that he had Mr. Scruggs</p> <p>15 representing him in personal matters.</p> <p>16 That is his testimony. But it's never</p> <p>17 been until today that we have found out</p> <p>18 that Mr. Scruggs, one of the personal</p> <p>19 matters that he represented him on was</p> <p>20 this case. That has never been clear</p> <p>21 until today, at least by anything that I</p> <p>22 am aware of.</p> <p>23 Now, if that retention letter in</p> <p>24 fact represents that he is representing</p>	<p>Page 1633</p> <p>1 stories about what this document is and in</p> <p>2 which case it's involved.</p> <p>3 THE COURT: You can get it?</p> <p>4 MR. ALDOCK: We have at it our</p> <p>5 office, your Honor. What I would like to</p> <p>6 do is over the lunch hour have it faxed</p> <p>7 somewhere so I can get it.</p> <p>8 THE COURT: Is Mr. Scruggs</p> <p>9 prepared to remain in Louisville? I</p> <p>10 assumed with us starting with this you</p> <p>11 wanted to get on back?</p> <p>12 MR. SCRUGGS: That was my</p> <p>13 intent, your Honor.</p> <p>14 THE COURT: How long is the</p> <p>15 document?</p> <p>16 MR. WERTHEIMER: Several pages.</p> <p>17 MR. SCRUGGS: Two or three</p> <p>18 pages, perhaps four. You have that in</p> <p>19 your office, you are on the same time,</p> <p>20 your office is open. Can somebody fax it</p> <p>21 to you, fax it here?</p> <p>22 MR. ALDOCK: If there is a</p> <p>23 fax -- I would like to take the it off the</p> <p>24 fax. We are talking about a privileged</p>
<p>Page 1634</p> <p>1 him in this case, then it should be</p> <p>2 produced.</p> <p>3 MR. ALDOCK: We have that at</p> <p>4 home.</p> <p>5 MR. SHEFFLER: That would go a</p> <p>6 long ways to solving at least one of the</p> <p>7 issues in the case; would it not?</p> <p>8 MR. ALDOCK: Why don't we try</p> <p>9 over the break, your Honor, to get the</p> <p>10 retention letter here so we can at least</p> <p>11 look at it make a judgment?</p> <p>12 MR. SHEFFLER: We can send a</p> <p>13 messenger over to our hotel.</p> <p>14 MR. ALDOCK: That's in our</p> <p>15 office, not in the hotel.</p> <p>16 MR. MILLMAN: The key is we</p> <p>17 need to see that document in camera. You</p> <p>18 have to review that document in camera.</p> <p>19 That is a requirement of the Supreme Court</p> <p>20 of Kentucky. And I think the first thing</p> <p>21 we have to do is have them produce that</p> <p>22 document for your review so that you can</p> <p>23 see exactly what it says.</p> <p>24 We have gotten very conflicting</p>	<p>Page 1635</p> <p>1 document.</p> <p>2 THE COURT: Yes, if you could</p> <p>3 call your office and ask them to let you</p> <p>4 know exactly when they can get it and call</p> <p>5 you back and you then stay by the fax</p> <p>6 machine and take it off there.</p> <p>7 MR. ALDOCK: Okay. I am prepared</p> <p>8 to do that. That would be fine, your</p> <p>9 Honor.</p> <p>10 THE COURT: That's number two.</p> <p>11 What's the third document?</p> <p>12 MR. MILLMAN: Number two is the</p> <p>13 outline, not the retention letter, the</p> <p>14 outline.</p> <p>15 MR. ALDOCK: They haven't asked</p> <p>16 for the retention letter until now. Now</p> <p>17 they have asked for it and we will talk</p> <p>18 about it.</p> <p>19 MR. SHEFFLER: We can address</p> <p>20 number two, the outline, before we get the</p> <p>21 retention letter. The retention letter</p> <p>22 may go to, you know, substantiating what</p> <p>23 Mr. Scruggs's role in all this is. But</p> <p>24 nevertheless even if he -- even if the</p>

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<p>Page 1637</p> <p>1 retainer letter says I am representing 2 Jeffrey Wigand in all matters, even if it 3 was that broad, and obviously we know that 4 it's not because he claims he didn't 5 represent him in Moose. But even if it 6 did say that, it seems to me we have a 7 different issue with respect to whether or 8 not an outline for a fact witness is a 9 privileged communication or subject to 10 work product protection with respect to 11 this matter, for a couple of reasons 12 first of all, was it prepared 13 for this case? And I think that's an 14 issue we don't have yet. If it was 15 prepared for another case, was that case 16 Moose. If it was, Mr. Wigand is a fact 17 witness. He was never represented by Mr. 18 Scruggs in that case, and, therefore, I'm 19 not sure there would be any protections 20 for that document. 21 MR. ALDOCK: You are doing a lot 22 of it's. He said it was prepared in this 23 case. I said another case. 24 MR. MILLMAN: That's why you</p>	<p>Page 1638</p> <p>1 a mistake on a log with all this these 2 documents. 3 MR. SHEFFLER: It's binded on 4 Mr. Wigand. 5 MR. ALDOCK: It can't be. Let's 6 get the retainer agreement. 7 MR. MILLMAN: Mr. Aldock is his 8 lawyer, it's the same thing we ran into 9 with Frank Doherty. For one reason they 10 are his lawyer and all of a sudden Mr. 11 Scruggs is his lawyer. 12 Mr. Scruggs under Rule 11 should 13 be counsel of record. He wants to come in 14 here and not put himself on the pleadings. 15 He says I'm co-counsel, I'm just not on 16 the pleadings. That's absurd in this 17 state. That doesn't work. 18 He is either going to obey the 19 rules of this court or he isn't. The 20 document is in the possession of Jeffrey 21 Wigand. It is not in the possession of 22 Mr. Scruggs. It is here in this 23 jurisdiction, or it was, in the possession 24 of Jeffrey Wigand or under his custody and</p>
<p>Page 1639</p> <p>1 need to see to see the document 2 MR. SHEFFLER: John, I know you 3 are a very good and careful lawyer. I 4 know you reviewed that document before you 5 made representations to the court about 6 it. And you after reviewing that 7 document, being intimately aware of this 8 case and this deposition, said it was not 9 an outline for this case. We have to go 10 by what we have 11 THE COURT: Once again, I think 12 Mr. Scruggs is stuck with that. 13 MR. ALDOCK: Your Honor, it's 14 not our document. 15 MR. SHEFFLER: You did see it. 16 THE COURT: It's your document 17 for this lawsuit. You are representing 18 Dr. Wigand in this action. Dr. Wigand had 19 the document. You looked at it and you 20 made -- 21 MR. ALDOCK: I made a judgment 22 without talking to him. I got it wrong. 23 It can't be that it's binding on him. 24 That's not fair. I feel terrible. I made</p>	<p>Page 1640</p> <p>1 control and that is, I submit, not work 2 product at this point in time if it was a 3 deposition in another case. 4 If it's in this case then that 5 leads to other issues as to whether or not 6 there has been a waiver by giving him a 7 deposition outline and helping him prepare 8 his testimony and so forth. That raises 9 another issue. 10 But if this was given to him, 11 this deposition outline in another case, 12 that's not work product. What we have to 13 do is you are entitled and we request that 14 you review that document in camera so that 15 you can determine for yourself what that 16 document is. 17 MR. ALDOCK: Your Honor, why 18 don't we recess and get a fax machine and 19 have the retainer agreement faxed here. 20 The first issue is who is he representing 21 which they are challenging. 22 MR. MILLMAN: He is not on the 23 record in this case. He is not -- 24 MR. SCRUGGS: Your Honor, you</p>

<p>Page 1641</p> <p>1 don't have to be counsel of record in a 2 lawsuit for a client to represent him and 3 be his lawyer and give him legal advice. 4 That's done all the time. Brown & 5 Williamson gets legal advice from lawyers 6 all the time that are not counsel of 7 record in this case. 8 THE COURT: I understand that. 9 That's not where I am hung up in my mind. 10 This is done in April of '96. The Brown & 11 Williamson Dr. Wigand case is already 12 pending. 13 MR. SCRUGGS: Yes, it is. 14 THE COURT: I'm not sure when 15 Mr. Alcock got into this action. 16 MS. WERTHEIMER: A month later, 17 May 20th. 18 THE COURT: At least he had 19 Kentucky counsel at that time. 20 MR. SCRUGGS: He did, counsel of 21 record. 22 MS. WERTHEIMER: Kentucky 23 counsel retained by Mr. Scruggs. 24 MR. SHEFFLER: Was Mobley</p>	<p>Page 1643</p> <p>1 information on cigarettes, enclosing 2 materials, sender author Richard F 3 Scruggs, esquire, recipient addressee 4 Jeffrey S. Wigand, applicable privilege. 5 Scruggs again. 6 And again, first, I think the 7 court has to see that in camera. And 8 certainly enclosing materials, the 9 materials -- even if there was a 10 privilege, the materials enclosed aren't 11 going to be privileged. And this, we 12 would argue very strongly even if there is 13 work product, which I don't think there 14 is, because we may have a compelling need 15 to know because this will go directly to 16 whether or not there has been a violation 17 of the restraining order entered by Judge 18 Knopf in this case. 19 MS. WERTHEIMER: If I could 20 address that for a moment. I thought when 21 we last met and we talked about the work 22 product issues, one reason that you and 23 your colleague reformulated the request 24 for production was because we agreed that</p>
<p>Page 1642</p> <p>1 counsel then? 2 MR. MILLMAN: Doherty was. That 3 was during the time when Doherty was 4 getting out. I'm not sure exactly when 5 Frank withdrew. It was around that time. 6 I'm not sure of the precise date that he 7 withdrew. 8 MS. WERTHEIMER: At that time I 9 represent to you that neither Shee and 10 Gardener or Joe Mobley was counsel of 11 record for this action for Dr. Wigand. 12 MR. MILLMAN: I think Doherty 13 was still counsel. 14 MR. ALCOCK: We could call and 15 if you could give us the fax machine we 16 will stand at the fax machine and get the 17 document when it comes over. 18 THE COURT: I think I need to 19 look at that also. 20 What's the third item before you 21 get -- 22 MR. MILLMAN: The third item is 23 PA 163 which is dated May 20, 1996. The 24 description is letter, RE expert</p>	<p>Page 1644</p> <p>1 the request as stated went to companies, 2 including Brown & Williamson and companies 3 other than Brown & Williamson. 4 So the request was reformulated 5 as to materials involved with Brown & 6 Williamson. Mr. Scruggs can address the 7 document. I will represent to you that 8 we -- 9 MR. SCRUGGS: I will have to 10 look at that. I didn't know that was 11 going to be an added issue here today. I 12 don't recall it. 13 THE COURT: What's the 14 difference between 163 and 135? 15 MR. SCRUGGS: 135 is the 16 deposition outline. 17 THE COURT: I understand. 18 MR. SCRUGGS: No, I'm asking. 19 I didn't know. 20 THE COURT: Yes. 21 MR. SCRUGGS: I did not know 22 163 was going to be an issue. I will have 23 to look at it again this morning. I 24 didn't come prepared to talk about 163.</p>

<p>Page 1645</p> <p>THE COURT: Can Mr. Aldock remind you of LAUSA?</p> <p>MR. SCRUGGS: Can we confer a moment and let them remind me?</p> <p>THE COURT: Or they can say on the record what it is. Certainly they have looked at and know what the document is at least. What's the difference between 162 and 163? 163 is not a another -- help me somebody else.</p> <p>MS. WEATHERS: 163, as we understood where we stood at the end of October 30th, the agreement I thought we had reached was that the documents with respect to Brown & Williamson -- there was a new production request or an amended production request would be called for by the log, but documents not related to Brown & Williamson that might relate to communications between Dr. Wigand and his counsel, Mr. Scruggs, or Mr. Scruggs and Dr. Wigand would not be covered by the new request because --</p> <p>THE COURT: If I recall</p>	<p>Page 1647</p> <p>did not. And so, therefore --</p> <p>THE COURT: Is the one that did not 163?</p> <p>MS. WEATHERS: That is correct.</p> <p>THE COURT: 163 doesn't even pertain to Brown & Williamson?</p> <p>MS. WEATHERS: No, it does not.</p> <p>MR. SHEFFLER: Why was it relevant enough to be put on the log?</p> <p>MS. WEATHERS: Because you had -- your original request was for all documents with respect to all tobacco -- your request was quite broad and it fell within the purview. I don't have the request with me.</p> <p>MR. ALDOCK: It was all tobacco.</p> <p>MS. WEATHERS: But there was no question that it met request six. When we talked about it, JAM and I and with the consent of the judge, agreed to reformulate the question.</p> <p>MR. MILLINAM: I think -- we're going to ask since it's on the log that</p>
<p>Page 1646</p> <p>correctly, in the MOORE case, the Mississippi case, there is numerous defendants. And matter of fact, I'm not sure if Brown & Williamson is even in that suit.</p> <p>MR. SHEFFLER: Yes.</p> <p>THE COURT: Brown & Williamson is one of several defendants: is that correct?</p> <p>MS. WEATHERS: Correct.</p> <p>THE COURT: And there could be references to other companies?</p> <p>MS. WEATHERS: Correct. And one of the reasons that the request was reformulated was that I believe we had agreement if it sought communications with respect to matters outside of Brown & Williamson, that that would not -- that the privilege would not be overcome by Brown & Williamson.</p> <p>And we reviewed the documents, all three of the documents, and of the three that were identified on the 30th, two related to Brown & Williamson, and one</p>	<p>Page 1648</p> <p>the court review that document in camera to determine whether or not it has anything to do with this case, and whether it's relevant or and whether it's called for and whether it's privileged.</p> <p>THE COURT: I can see how it could be relevant to the contempt matter which is not before the court. And everybody is saying that's going to be some time off. And I would think that Judge Weisner could look at it at the time of the hearing of the contempt -- if it doesn't pertain to the contempt it's just totally irrelevant in this lawsuit.</p> <p>MR. MILLINAM: Your Honor, I think you ought to look at that and satisfy yourself what it is.</p> <p>MR. SHEFFLER: There is one thing that may relate to this lawsuit and that's the reason I think we did request it. One of our allegations in this lawsuit is Mr. Wigand used information that he acquired during his tenure at Brown & Williamson to assist others in</p>

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<p>Page 1649</p> <p>1 consulting with others, other attorneys, 2 other lawyers and other people who were 3 bringing suits against Brown & Williamson 4 and other defendants</p> <p>5 " Indeed Mr. Wigand was given 6 materials, albeit about cigarettes in 7 general, albeit about tobacco --</p> <p>8 THE COURT: You are saying that 9 that's a cause of action, not just grounds 10 for contempt?</p> <p>11 MR. SHEPHERD: That goes 12 directly to our cause of action. That is 13 a further violation of his agreement as 14 well as the restraining order but it's a 15 violation of his agreement.</p> <p>16 One of the things we are 17 alleging is exactly what appears to be 18 happening here. We are saying Mr. Wigand 19 is selling his services as a 20 consultant/expert/advocate against 21 tobacco to people like Mr. Scruggs.</p> <p>22 We are saying he is selling 23 those services as a result of information 24 he acquired while he was employed at Brown</p>	<p>Page 1651</p> <p>1 where we go from there.</p> <p>2 THE COURT: Will you have 135 3 and 163?</p> <p>4 MR. ALDOCK: They are back at 5 the hotel. I would rather not make a trip 6 now.</p> <p>7 THE COURT: Could they be faxed 8 also?</p> <p>9 MR. ALDOCK: There is nobody to 10 fax at the hotel.</p> <p>11 THE COURT: But from your 12 office. Is your only copy at your hotel?</p> <p>13 MR. ALDOCK: No, I'm sure there 14 is a copy at the office. But they are 15 quite long.</p> <p>16 THE COURT: Does Dr. Wigand have 17 one with him this morning?</p> <p>18 MR. ALDOCK: No.</p> <p>19 THE COURT: Mr. Scruggs, do you 20 have one with you?</p> <p>21 MR. SCRUGGS: I have nothing 22 with me this morning. I wasn't even 23 prepared to talk about 163. I think -- 24 didn't think that was at issue.</p>
<p>Page 1650</p> <p>1 & Williamson.</p> <p>2 If indeed this letter reflects 3 that Mr. Scruggs had consulted with Mr. 4 Wigand on those matters, that's a direct 5 violation of his confidentiality 6 agreement, it's a breach, and it goes 7 directly to what we are suing him for.</p> <p>8 THE COURT: Well stated. I'm 9 afraid I have to look at 163 also then to 10 answer that. If it goes to the cause of 11 action -- I was thinking if it just went 12 to the contempt, I'm not sure I'm well 13 enough versed in the contempt proceedings 14 to answer that.</p> <p>15 But I think now with what I have 16 just been told, if it goes to a cause of 17 action -- I should have gone back and 18 reviewed that complaint again. If that's 19 a fair representation of a cause of action 20 that's set out in the complaint, then I 21 guess I need to review 163 also.</p> <p>22 Now --</p> <p>23 MR. ALDOCK: Let's take a recess 24 and get the retainer agreement and see</p>	<p>Page 1652</p> <p>1 MR. ALDOCK: We didn't either 2 actually.</p> <p>3 MR. SCRUGGS: I didn't realize 4 that all the lawyer's communications with 5 his client were going to be at issue 6 today.</p> <p>7 THE COURT: Would you be able to 8 go to your hotel at noon and retrieve the 9 documents, the 135 and 163, and would that 10 permit Mr. Scruggs to get on his way back 11 to Mississippi or wherever he is going? 12 Or would you feel comfortable -- I think I 13 have got your arguments now and I think 14 they understand your arguments and can 15 carry it on. I think I have to look at 16 those documents before I can even answer</p> <p>17 MR. ALDOCK: Why don't we take a 18 recess while we get the retainer agreement 19 and then we will respond to your question 20 about what we do at the lunch hour, that 21 would be good.</p> <p>22 THE COURT: Okay.</p> <p>23 THE VIDEOGRAPHER: Going off the 24 record. The time is approximately 10:04.</p>

<p>Page 1653</p> <p>1 (Recess taken.)</p> <p>2 THE VIDEOGRAPHER: Going on the</p> <p>3 record, the time is approximately 10:30</p> <p>4 MR. ALDOCK: Your Honor, at your</p> <p>5 request we have had faxed to us from our</p> <p>6 office as October 30, 1995 letter, PA 103,</p> <p>7 from Richard Scruggs to Jeffrey Wigand,</p> <p>8 that says, RE, legal representation. And</p> <p>9 I represent to you that it is a retained</p> <p>10 letter of counsel.</p> <p>11 We are prepared to produce it to</p> <p>12 your Honor in camera today with the</p> <p>13 proviso that Brown & Williamson will not</p> <p>14 argue that our producing it to you in</p> <p>15 camera is any kind of waiver. And with</p> <p>16 the proviso that we are producing it only</p> <p>17 in camera and that we are not producing it</p> <p>18 for production to Brown & Williamson, and</p> <p>19 would like it back if we can't reach</p> <p>20 agreement on the next step.</p> <p>21 We are prepared to produce it to</p> <p>22 you in camera on those two provisos.</p> <p>23 THE COURT: I think as a matter</p> <p>24 of law producing it in camera for the</p>	<p>Page 1653</p> <p>1 document?</p> <p>2 THE COURT: That's the letter,</p> <p>3 103. I had understood it to be 130, it's</p> <p>4 103, they corrected me. It's the letter</p> <p>5 dated October 30 from Mr. Scruggs to</p> <p>6 Dr. Wigand.</p> <p>7 MR. MILLMAN: Okay. That's</p> <p>8 October 30th.</p> <p>9 THE COURT: And it does set</p> <p>10 out -- without divulging, it does set out</p> <p>11 a representation of counsel-client. So it</p> <p>12 would be privileged communication, without</p> <p>13 even getting into work product.</p> <p>14 My understanding, I think from</p> <p>15 the last case ruled upon by a Kentucky</p> <p>16 Supreme Court, a document can in some</p> <p>17 instances be both work product and</p> <p>18 privileged communication. But either one</p> <p>19 suffices, and I would view it as</p> <p>20 privileged communication.</p> <p>21 MR. MILLMAN: That leaves us</p> <p>22 with the other three documents.</p> <p>23 THE COURT: I should say then I</p> <p>24 would allow -- since it's privileged, and</p>
<p>Page 1654</p> <p>1 court's inspection does not break the</p> <p>2 privilege. Would you agree with that, Mr. Millman?</p> <p>3 MR. MILLMAN: Yes.</p> <p>4 THE COURT: Okay. Shall we</p> <p>5 retire then to the room I call your room</p> <p>6 and we will look at it?</p> <p>7 THE VIDEOGRAPHER: Going off the</p> <p>8 record, the time is approximately 10:31.</p> <p>9 (Recess taken.)</p> <p>10 THE COURT: Back on the record.</p> <p>11 THE VIDEOGRAPHER: Back on the</p> <p>12 record, the time is approximately 10:33.</p> <p>13 THE COURT: Okay. Let the</p> <p>14 record show that the Special Commissioner</p> <p>15 has examined document number PA 150, the</p> <p>16 letter dated --</p> <p>17 MS. WERTHEIMER: Your Honor, 103.</p> <p>18 THE COURT: 103. How did I get</p> <p>19 103? Examined it in camera, and on the</p> <p>20 basis of the reading, the Special</p> <p>21 Commissioner would recommend to the court</p> <p>22 that the objection to the production be</p> <p>23 sustained.</p> <p>24 MR. MILLMAN: That is of what</p>	<p>Page 1654</p> <p>1 I sort of, maybe wrongly, place a higher</p> <p>2 status on privileged communication than I</p> <p>3 do on work product. And that seems to be</p> <p>4 the trend of the courts. They keep</p> <p>5 tearing holes in work product.</p> <p>6 But in any event, in spite of</p> <p>7 the mislabeling by Mr. Aldock, I think he</p> <p>8 took the credit for that.</p> <p>9 MR. ALDOCK: I did.</p> <p>10 THE COURT: I would say that it</p> <p>11 is privileged communication and/or work</p> <p>12 product and we don't need to go any</p> <p>13 further in my opinion into the erroneous</p> <p>14 misstatement, if it was erroneous, in the</p> <p>15 log that was furnished to Brown &</p> <p>16 Williamson's counsel.</p> <p>17 MR. SHEFFLER: That is with</p> <p>18 respect to 103?</p> <p>19 THE COURT: With respect to 103</p> <p>20 MR. MILLMAN: We still need to</p> <p>21 talk about 150.</p> <p>22 THE COURT: Yes.</p> <p>23 MR. MILLMAN: Which they have</p> <p>24 refused to produce in camera.</p>

<p>Page 1657</p> <p>MS. WERTHEIMER: I don't think we got that far. We wanted to take this one step at a time. We have now produced the retention letter in camera.</p> <p>MR. WILLIAMSON: Can we then for the record state unequivocally that Mr. Scruggs is representing Jeffrey Wigand in this action in Jefferson Circuit Court?</p> <p>THE COURT: Not in this action.</p> <p>MR. SCRUGGS: I represent Dr. Wigand, and I give legal advice to Dr. Wigand in a variety of issues, which would be subsumed by matters that are in issue in this litigation.</p> <p>Mr. Scruggs is not counsel of record in this litigation.</p> <p>THE COURT: May I say further from my examination of the October 30th letter, it could suffice for work product because it goes into strategies, you know, without enumerating. So it could be regarded as a privileged communication or as work product. And it did talk about -- it was in anticipation of Brown &</p>	<p>Page 1659</p> <p>place a heavier burden on -- the initial burden usually isn't on the mover. It's on the one objecting. But at this stage I have swung back to where now we know the relationship between Mr. Scruggs and Dr. Wigand. So it gives a different approach to these other documents.</p> <p>I'm going -- it's going to take more argument, I believe, to convince me that they should have to furnish these other documents.</p> <p>MS. WERTHEIMER: Your Honor, we will -- we are prepared now to -- I'm prepared to go back to the hotel at this juncture at a later juncture and retrieve those three documents for your review in camera provided the two conditions we discussed before attach: one, providing them to you in camera cannot be constituted to be a waiver for any argument that there is a waiver; and two, that we would respectfully take your ruling but we would then have to determine where we go with those documents.</p>
<p>Page 1659</p> <p>Williamson/Dr. Wigand litigation to bail that down. It specifically mentions it.</p> <p>MR. ALDOCK: Our position, your Honor, is having had that representation made between lawyer and client, any communication, including the other three documents between the two of them, is within the scope of that document.</p> <p>THE COURT: It's going to make it much more difficult for Brown & Williamson to get to see the other three documents.</p> <p>Clear me up once, I had written down the letter as 150 and it's now 103.</p> <p>MS. WERTHEIMER: 103 is a separate document, your Honor. Brown & Williamson had not moved to compel on 103. They then asked for it and this provoked the fax. 103 sets forth the terms and conditions of the agreement between Mr. Scruggs and Dr. Wigand. There are three documents --</p> <p>THE COURT: 130, 135, and 163 are still on the table. And it's going to</p>	<p>Page 1660</p> <p>THE COURT: With the last argument given on document 163 and that it could show an alleged continuing revelation by Dr. Wigand of confidential information of however product --</p> <p>MR. SKEETLER: Confidential information, your Honor.</p> <p>THE COURT: Confidential information and the breach of contract cause of action. I'm going to have to look at that 163 pretty carefully. I believe. I don't want to take away from them, from Brown & Williamson, the basis for its cause of action.</p> <p>I mean, it's going to be a balancing of the scales, I believe, on that document, and it's going to be a close balancing of the scales.</p> <p>Off the top of my head it would seem that if somebody has a contract not to reveal certain trade secrets and goes out and reveals them and then claims either work product or privileged communication, it would take away from the</p>

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<p>Page 1661</p> <p>1 offended party their ability to prove it 2 which would be perhaps the only way they 3 could prove it 4 if no other act had ever 5 happened except that one and they knew it 6 had happened but they couldn't get to it 7 because of a claim of privileged 8 communication or work product -- 9 MR. ALDOCK: Except, your Honor, 10 on a privilege issue, Dr. Wigand has. I 11 will stipulate, said all kinds of things 12 to Laura and to myself that they would 13 regard as absolutely violating the 14 confidentiality agreement because we are 15 his lawyers. What's the difference? 16 MR. SHEFFLER: There is a 17 difference and I will tell you the 18 difference, your Honor. The difference is 19 if Mr. Wigand was employed by Mr. Scruggs 20 to give him consulting information to help 21 him in pursuing cases against other 22 tobacco defendants or Brown & 23 Williamson -- 24 MR. SCRUGGS: I will represent</p>	<p>Page 1662</p> <p>1 MR. ALDOCK: You will see 2 MR. WILLIAMSON: Your Honor, this 3 whole thing is an absolute sham. I mean, 4 what Mr. Scruggs is saying. I subpoena my 5 client. Now he has said he has had a 6 representation of him since October. He 7 files his plans up here, puts him on the 8 plane, flies him back to Mississippi, 9 de-briefs him, finds out everything he 10 knows about Brown & Williamson. And in his 11 capacity as an attorney comes in and hides 12 it, hides it under the attorney-client 13 privilege. Then subpoenas him at the 14 airport in Jackson, Mississippi for a case 15 in which Mr. Scruggs is representing the 16 Attorney General of Mississippi. 17 They say, well, you are not 18 represented by counsel. Now, if Mr. 19 Scruggs has de-briefed him, he has all 20 this information he can now use against 21 the tobacco industry. 22 All in violation of this -- 23 and the testimony of Wigand took place in 24 direct violation of the order of Judge</p>
<p>Page 1662</p> <p>1 to you that did not happen and that that 2 is not reflected in any of the documents 3 at issue. That just absolutely did not 4 happen. I have never employed Dr. Wigand. 5 That's preposterous. 6 THE COURT: Mr. Aldock, I 7 thought I made that point a while ago, the 8 fact that there is other tobacco 9 defendants in the Moore case -- I'm not 10 sure if Mr. Scruggs can say to Dr. Wigand, 11 I know you have a confidential contract to 12 keep trade secrets confidential, but give 13 them to me so I can use them against A, B 14 and C and then we will claim privilege 15 communication or work product. I'm not 16 sure -- that just doesn't set right in my 17 mind. 18 MR. ALDOCK: We are prepared to 19 show you the documents, your Honor, on the 20 conditions that we have outlined. But all 21 these documents, he has represented were 22 for use in his representation here, not in 23 Mississippi. 24 THE COURT: Possibly.</p>	<p>Page 1664</p> <p>1 Knopf. And they said, oh, well, we gave 2 you two hours notice. We offered to let 3 you meet with him. 4 Judge Marston said that that was 5 not reasonable. He said that in the 6 ruling. That was not reasonable notice. 7 So now what they are doing they are using 8 the attorney-client privilege. And that's 9 why we have to see these documents, and 10 have further argument. 11 To get information under the 12 guise of the attorney-client privilege, 13 that is not permissible. They cannot use 14 the attorney-client privilege to evade the 15 order of Judge Knopf. 16 THE COURT: We can argue from 17 now till noon until they go get the 18 documents and it won't accomplish 19 anything. Until I see the documents I 20 can't make any further ruling. 21 The question now becomes can we 22 free up Mr. Scruggs to get on or you can 23 stay if you want. I just -- I want you to 24 have the option as to whether or not --</p>

<p>Page 1665</p> <p>MR. SCRUGGS: Let me confer with counsel, if I can.</p> <p>MR. ALDOCK: If we are going to continue the matter at noon you have got to be here.</p> <p>MS. WERTHEIMER: Could we make a recommendation? And have Mr. Scruggs, since his relationship with Dr. Wigand seems plainly at issue, from my understanding of the arguments on the other side of the table, that Mr. Scruggs can recuse himself from sitting at the deposition and we can reconvene when we have the documents.</p> <p>MR. ALDOCK: That's fine, reconvening after lunch.</p> <p>MR. SHEFFLER: That will work.</p> <p>MS. WERTHEIMER: We have several other modestly small production issues.</p> <p>THE COURT: He may need those for his questions of Dr. Wigand.</p> <p>MR. MILLIMAN: We are getting something.</p> <p>MS. WERTHEIMER: The</p>	<p>Page 1665</p> <p>documentary evidence of that.</p> <p>We are producing today what was logged as PA -- I'm sorry, I can't read the number on this copy. However the indemnification agreement was logged previously it's now being produced as Wigand 03127.</p> <p>The last set of documents that were at issue were Dr. Wigand's tax returns. After colloquy among counsel, Brown & Williamson agreed to narrow their request to seek return information for calendar years 1993, '94 and '95 and only to seek sources of income for those years.</p> <p>And counsel for both parties agreed that the income tax returns would be produced subject to a protective order.</p> <p>We have appropriately redacted all but sources of income and we have reviewed the redactions with Judge Revell.</p> <p>We will produce these today subject to the understanding among counsel that they are being produced under a protective order. And we need to agree to</p>
<p>Page 1666</p> <p>recommendation of the Special Commissioner that the parties had agreed to reflects that Dr. Wigand, through his counsel, will produce three sets of documents. Two are documents for which privilege -- we were instructed to claim privilege of work product by Wilmer, Cutler and Pickering. And Wilmer, Cutler and Pickering informed us and Mr. Milliman together that they were withdrawing their claim of privilege for PA 180 and PA 188. And we are now producing them as Wigand 03104. And Wigand 03124.</p> <p>MR. SCRUGGS: May I be excused from this?</p> <p>THE COURT: Yes.</p> <p>MS. WERTHEIMER: The second issue that we addressed the other day was production of the indemnification agreement. The ruling -- the recommendation by Special Commissioner Revell was that the indemnification agreement be produced but not the negotiations leading up to it, the</p>	<p>Page 1666</p> <p>the terms of that protective order.</p> <p>MR. MILLIMAN: The same as the sealed documents?</p> <p>MS. WERTHEIMER: Right.</p> <p>MR. SHEFFLER: We haven't -- we will address the terms of how we use them.</p> <p>MS. WERTHEIMER: We are producing them today subject to our agreement that we will have a protective order.</p> <p>MR. SHEFFLER: He is -- the terms of which will be worked out.</p> <p>MS. WERTHEIMER: Worked out.</p> <p>MR. MILLIMAN: Correct me if I'm wrong, again, Laura, what about the Justice Department? I forget -- do they get copies of these or not? I'm not sure.</p> <p>MS. WERTHEIMER: I don't believe we have previously produced to the Justice Department the documents we have produced in this litigation.</p> <p>MR. MILLIMAN: Okay.</p> <p>MS. WERTHEIMER: I would be happy to produce the indemnification</p>

<p>Page 1669</p> <p>1 agreement and the Wilner, Outlet 2 documents. I'm not at liberty to produce 3 the income tax returns. 4 MS. WARREN: Okay. 5 MR. SHEFFLER: One last 6 housekeeping matter, your Honor. In the 7 previous deposition we produced an 8 exhibit -- we produced Exhibit Number 9 Wigand Number 71. And we produced it for 10 the purpose of -- it's an affidavit by 11 Martina Thomas. 12 If you recall, your Honor, I'm 13 sure you don't, but at the time we said 14 that we were really referring to the 15 affidavit itself although it had a number 16 of attachments. 17 One of those attachments, your 18 Honor, is a document we have also produced 19 in this case, marked in this case under 20 seal. And that was, if you recall, 21 Dr. Wigand came in in the middle of the 22 day with a document that he threw down on 23 the table and made a little speech about. 24 And then after we looked at it,</p>	<p>Page 1670</p> <p>1 We said we were not at liberty 2 to discuss that, it had been placed under 3 seal at the judge's request. We 4 understood it was there, we thought it was 5 inadvertent. We could not comment on it. 6 But I want to make clear for the record 7 that it was somehow released. I 8 appreciate inadvertently, but it was 9 released when the exhibits were released 10 in the flurry of the deposition. 11 And I think that that's -- the 12 cow is out of the barn as it were. 13 MR. SHEFFLER: It may be and may 14 not. I don't know that to be a fact, your 15 Honor, but regardless of whether it is or 16 isn't, I think for consistency sake we 17 would request that it be placed under 18 seal. 19 MS. WEATHERS: We have no 20 objection to it, and we treated it as 21 such. I just wanted to note for the 22 record the damage may have been done 23 already with that. 24 MR. SHEFFLER: I appreciate that.</p>
<p>Page 1670</p> <p>1 It was determined that it was stamped as a 2 privileged attorney work product and we 3 asked the document be placed under seal. 4 And your Honor did place that under seal. 5 And we would like to have the same portion 6 of Exhibit 71 placed under seal as well. 7 MS. WEATHERS: Let me respond 8 to that, your Honor. It's my 9 understanding that these exhibits -- we 10 treated these exhibits to be treated the 11 way we got them. That is, when we 12 received an exhibit, like sealed Exhibit 13 No. 1, Brown & Williamson sealed Exhibit 14 No. 1, we -- sealed Exhibit No. 1 -- we 15 treated it as sealed and disseminated it 16 to no one. 17 Similarly with Dr. Wigand's 18 sealed Exhibit 1, that agenda item, we 19 have not distributed it. I am -- I have 20 a high degree of confidence that the media 21 were given access to, not by us but by 22 others, these exhibits because we received -- 23 call it Exhibit 71, specifically the 24 agenda.</p>	<p>Page 1672</p> <p>1 Okay. Your Honor? 2 THE COURT: Are we ready to 3 start with Dr. Wigand? 4 MR. SHEFFLER: I think we are. 5 THE COURT: Let me swear you, 6 it's been a few months. Raise your right 7 hand, please. 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p>

<p style="text-align: right;">Page 1673</p> <p>1 JEFFREY WIGAND, 2 having been previously sworn, as 3 hereinafter certified, deposes and says as 4 follows: 5 CROSS EXAMINATION 6 BY MR. SHEFFLER: 7 Q. Good morning, again, Mr. Wigand. 8 Let me remind you of an instruction I gave 9 you at the last time that we had a chance 10 to discuss some of the matters with 11 respect to this suit. 12 At that time I told you that my 13 questions should not be interpreted as 14 requiring you or requesting you to produce 15 information or provide information with 16 respect to your testimony, if you have 17 given any testimony, to a grand jury. 18 And I was not asking in my 19 questions at that time, nor will I ask it 20 at this time, for the recitation by you of 21 things that you may have said to U.S. 22 Attorneys in preparation for the grand 23 jury testimony, or in the grand jury 24 testimony itself, whether or not that has</p>	<p style="text-align: right;">Page 1675</p> <p>1 the testimony? 2 A. No, I have not. 3 Q. In the course of your review of 4 the testimony did you annotate it? Did 5 you make any notes on it? 6 A. No. 7 Q. Did you make any notes to 8 yourself about it? 9 A. No. 10 Q. Did you make any document at all 11 with respect to that testimony and the 12 review of it? 13 A. No. 14 Q. Now, other than your attorneys 15 from Shea & Gardner, Mr. Aldock and Miss 16 Wertheimer, have you talked about the 17 deposition transcript with anyone else? 18 A. What do you mean by anyone else? 19 Q. Well, anyone else means anyone 20 else. 21 A. Mr. Mobley I believe briefly. 22 Other than counsel, I don't believe I have 23 talked to anybody else. 24 Q. Let's get one thing clear right</p>
<p style="text-align: right;">Page 1674</p> <p>1 ever occurred. Do you understand what I 2 am saying? 3 A. Yes. 4 Q. Okay. Also, remember you have 5 to answer verbally for the transcription. 6 And additionally, sir, just as a point of 7 clarification, anything that you said to 8 U.S. Attorneys or grand juries, whether 9 that's taken place or not, anything that 10 you may have said to U.S. Attorneys or 11 grand juries does not necessarily in and 12 of itself make it immune from discovery if 13 you have repeated the same allegations to 14 others. Do you understand that, too? 15 A. Yes. 16 Q. Okay. Now, since our last 17 deposition date back in July, have you had 18 a chance to see the testimony that you 19 gave at that time in transcription form? 20 A. Yes. 21 Q. Have you -- you have reviewed 22 the testimony then? 23 A. I reviewed the testimony, yes. 24 Q. Did you see any videotapes of</p>	<p style="text-align: right;">Page 1676</p> <p>1 now, sir. Who are your counsel in this 2 case? 3 A. In Kentucky? 4 Q. Yes, this case is in Kentucky, 5 the case of Brown & Williamson versus 6 Jeffrey Wigand. Who are your counsel? 7 A. Local counsel is Joseph Mobley 8 and Shea & Gardner. 9 Q. Okay. Those are your counsel. 10 That's how you testified last time, 11 right? 12 MR. ALDOCK: I'm not sure what 13 you are trying to do, counsel. You have 14 already been instructed that Mr. Scruggs 15 is advising him on matters. His counsels 16 are of record. If you are trying to get 17 some type of admission because he doesn't 18 know the niceties, then it isn't fair. 19 And if you are trying to do something 20 else -- 21 Q. What I am really trying to get 22 at is what Mr. Wigand appreciates is his 23 counsel for this case. That's really what 24 I am trying to get. I think I am entitled</p>

<p style="text-align: right;">Page 1677</p> <p>1 to it. If -- if there turns out to be a 2 question whether communications were given 3 by Mr. Wigand to others, I mean, I think 4 one of the issues here as we have seen 5 today is that he has various counsel for 6 various things. I wanted to get his 7 understanding of who his counsel are. 8 THE COURT: All right. 9 Q. You stated that your counsel 10 today are Shea & Gardner and Mr. Mobley 11 for this case? 12 A. I would also say Mr. Scruggs and 13 Mr. Motley, those are two personal 14 attorneys. 15 Q. I understand that. I understood 16 about Mr. Scruggs. This is the first time 17 I understood about Mr. Motley. 18 A. I think I told you that last 19 time. 20 Q. Last time, sir, you told us that 21 Mr. Motley had retained you as an expert 22 consultant to help in litigation? 23 A. To as a non-testifying expert; 24 that is correct.</p>	<p style="text-align: right;">Page 1679</p> <p>1 contract. 2 It's no defense to a breach of 3 contract in disclosure of privileged 4 communications to simply say, well, I 5 retained him to give me privileged 6 communications. That's no defense. 7 If Mr. Motley has been retained 8 by Mr. Wigand to represent him, for 9 example, in this case, and had discussions 10 with him about privileged communications 11 or about what he has done with that 12 communications in this case, that's fine, 13 I won't ask about that. If Mr. Motley has 14 retained Mr. Wigand to help him in the 15 Moore case, and prepare depositions of 16 others or of himself in the Moore case, he 17 can't protect that information by suddenly 18 saying, well, I want to make him -- we are 19 going to make an attorney-client 20 relationship here so all that will be 21 privileged. 22 If it was a breach, it was a 23 breach. And simply by Mr. Wigand entering 24 into another contractual relationship</p>
<p style="text-align: right;">Page 1678</p> <p>1 Q. He is also your attorney? 2 A. That is correct. 3 Q. When did Mr. Motley become your 4 attorney? 5 A. I can't recall for sure. 6 Q. Well, was it within the last 7 year? 8 A. Within the last year. 9 Q. So within the last year you 10 retained Mr. Motley to represent you? 11 A. Yes. 12 Q. You have to say yes. 13 A. Yes. 14 Q. In what matters did you retain 15 Mr. Motley to represent you? 16 MR. ALDOCK: Objection. What 17 matters he has retained him in is not 18 relevant. And it's privileged. 19 MR. SHEFFLER: Your Honor, I 20 think it is relevant and I'm not sure that 21 it is privileged. But it's certainly 22 relevant in terms of whether or not Mr. 23 Motley and Mr. Wigand have engaged in 24 activities that may be in breach of his</p>	<p style="text-align: right;">Page 1680</p> <p>1 after the fact is not protected from 2 discovery and doesn't protect it as a 3 breach. 4 MR. ALDOCK: Your Honor, I will 5 represent that Mr. Motley was retained by 6 Dr. Wigand to explore the possibility of 7 other litigation. I think anything beyond 8 that is clearly privileged. Within the 9 last year. 10 THE COURT: I'm inclined from -- 11 after going through, let's call it the 12 Scruggs' objection of a few minutes ago to 13 follow the same pattern. I mean, it 14 didn't set good until I saw the letter, 15 when I saw the letter it was there. So I 16 suppose I should bow to Mr. Aldock's 17 characterization. I mean, he knows the 18 case and so I'm going to sustain the 19 objection. 20 MR. SHEFFLER: Okay. 21 BY MR. SHEFFLER: 22 Q. Well, let me ask Mr. Wigand, if 23 Mr. Aldock's representation was your 24 understanding as well, that Mr. Motley has</p>

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<p style="text-align: right;">Page 1681</p> <p>1 been retained by you for future unfiled 2 litigation? 3 A That is correct. 4 Q Okay. So you have not been 5 retained -- you have not retained Mr. 6 Motley for any pending litigation? 7 A I believe that is correct. 8 Q Okay. So the only 9 attorney-client relationship that you have 10 with Mr. Motley is for litigation yet to 11 be filed, just -- 12 A I believe so. 13 Q Okay. Now, let's go back to Mr. 14 Scruggs. In addition to this case, 15 whatever the relationship that you have 16 with Mr. Scruggs in this case, is there 17 any other pending litigation for which Mr. 18 Scruggs has been retained? 19 A I don't believe so. 20 Q Okay. So the only pending 21 litigation that you are involved in is 22 this case with Mr. Scruggs? 23 A Yes. 24 Q Now, has Mr. Scruggs as well</p>	<p style="text-align: right;">Page 1683</p> <p>1 Q Anybody else? 2 A Not to my knowledge. 3 MS. WERTHEIMER: Pardon me, the 4 record, the papers also indicate, and I 5 think there was discussion with Mr. 6 Milliman, that Mr. Johnson of another law 7 firm was also involved in this action. 8 Q Anybody else? 9 A Not that I can recall. 10 Q Have you retained anybody to 11 represent you in this suit other than Mr. 12 Scruggs who has not made an appearance to 13 your knowledge in the case? 14 A I don't understand the question. 15 MR. ALDOCK: In this action? 16 Q In this case. 17 A I don't believe so, but -- 18 Q All right. Let me go back to 19 the deposition transcript again. Are 20 there any changes, sir, that you would 21 like to make to that deposition transcript 22 on the basis of accuracy? 23 MR. ALDOCK: Objection; the 24 rules do not allow that question. The</p>
<p style="text-align: right;">Page 1682</p> <p>1 retained you as a non-testifying expert? 2 A No. 3 Q Okay. Just Mr. Motley? 4 A Just Mr. Motley. 5 Q Okay. Has he ever retained you 6 as a non-testifying expert? 7 A No. 8 Q Okay. Now, could you tell us, 9 sir, who were all of the attorneys that 10 have represented you in this case, could 11 you name them for us? We have obviously 12 Mr. Aldock and his firm Shea & Gardner. 13 And we have the firm of Joe Mobley, 14 whatever it is. Who else have you 15 retained to represent you in this case, 16 Mr. Scruggs, whatever his firm is. 17 Has there been anybody else that 18 you have retained to represent you in this 19 case? 20 A I believe you have Doheny, Hirn 21 was retained, yes. 22 Q And that would be Mr. Doheny was 23 a principal -- 24 A Is the principal, Todd Thompson.</p>	<p style="text-align: right;">Page 1684</p> <p>1 deposition isn't closed, he has a right to 2 review it, he has a right to review it 3 with counsel. That an inappropriate 4 question. 5 MR. SHEFFLER: Your Honor, I 6 don't know if it's inappropriate to ask 7 him after the review of the deposition 8 that he had last July if he saw anything 9 there that he misstated or he would like 10 to change at this time. 11 MR. ALDOCK: The deposition is 12 not closed. We have reserved the right, 13 your Honor, to review -- read and review 14 and file an errata sheet and will at the 15 appropriate time. 16 THE COURT: The rule permits 17 that. 18 MR. SHEFFLER: There is no 19 problem with that, your Honor. I realize 20 that he has that right and I'm sure that 21 he will act upon it. All I want to know 22 right now is if in reading the testimony 23 he said, oh yeah, this is wrong or I 24 should have said this differently.</p>

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<p>1 MR. ALDOCK: I don't think he is 2 entitled to get a partial -- let me see 3 what I can think of now because next time 4 I am going to say he didn't think of 5 everything when he is going to get a 6 complete review at the end and they are 7 going to have the results of it. 8 THE COURT: I will sustain the 9 objection. 10 Q. All right. Now, you say that 11 you didn't make any notes or outlines or 12 indices or summaries. Have you -- to your 13 knowledge, has anyone shared with you any 14 notes, outlines or indices, other than the 15 attorneys of Shea & Gardner and Joe 16 Mobley? 17 A. No. 18 Q. Okay. And I may have asked you 19 this, sir, but I just don't remember. Did 20 you share the information in that 21 deposition with anyone since your last, 22 since the last deposition we had? 23 A. Other than my attorneys, no. 24 Q. You didn't talk to Andy McGuire</p>	<p>1 Q. Did you meet with Mr. Motley or 2 anybody from his firm or associated with 3 his firm at the end of the deposition day? 4 A. No. 5 Q. So the only time you had any 6 contact -- 7 A. I assumed in the context did I 8 meet with them to discuss the deposition? 9 No, I did not discuss the deposition with 10 Mr. Motley. 11 Q. The question was a little 12 different. Did you have any 13 communications, verbal, written, 14 telephonic, in person with Mr. Motley or 15 anyone associated with Mr. Motley's firm 16 during the course of the deposition except 17 at the lunch break that you have already 18 testified about? 19 MR. ALDOCK: On any subject? 20 Q. On any subject, we will start 21 there. 22 A. On any subject? Yes. 23 Q. Could you tell me how many 24 times?</p>
Page 1686	Page 1688
<p>1 about it, for example? 2 A. No. 3 Q. Have you had any contact with 4 Andy McGuire since the previous deposition? 5 A. No. 6 Q. Did you have any discussions 7 with Mr. Motley about the deposition? 8 A. No. 9 Q. Any discussions with anyone 10 associated with Mr. Motley's firm? 11 A. No. 12 Q. Okay. At the last deposition, 13 sir, there was an occasion where you had 14 discussions with Mr. Motley during the 15 course of the deposition; do you recall 16 that? 17 A. That's correct. 18 Q. Okay. Did that happen more than 19 one time? 20 A. Did I see Mr. Motley during 21 lunch break? Yes. 22 Q. How many times? 23 A. At least once. To the best of 24 my recollection once or twice.</p>	<p>1 A. No. 2 Q. Well, was it more than two? 3 A. I can't recall. 4 Q. Okay. So it could have been as 5 many as two or 10 or 15 or 20? 6 A. Two, five, I'm not certain. 7 Q. What were the subjects of the 8 conversations? 9 A. Baseball. 10 Q. That's it, baseball? 11 A. Yeah. The weather. 12 Q. Okay. Were these in-person 13 conversations? 14 A. They could have been in person 15 or they could have been in a group at 16 dinner. 17 Q. Okay. And so you had -- 18 A. I did not -- I just to make it 19 this perfectly clear, I did not discuss 20 the contents of the deposition with Mr. 21 Motley or anyone with Mr. Motley. 22 Q. Did you discuss tobacco matters 23 at all? 24 A. Not that I recall.</p>

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<p style="text-align: right;">Page 1689</p> <p>1 Q Mr. Motley is a attorney. Do 2 you know where he is from? 3 A Yes, I do. 4 Q Where? 5 A South Carolina. 6 Q South Carolina. He came up and 7 were these -- you said these were at 8 dinner with a group. Who all was at this 9 group dinner? 10 A I can't recall specifically but 11 I believe myself, my attorneys, Mr. 12 Motley. 13 Q Anybody else from Mr. Motley's 14 firm? 15 A May have been from time to time; 16 Cathy McGregor, which is the secretary. 17 Q Is she a paralegal? 18 A Paralegal. 19 Q Anyone else? 20 A There may have been, I can't 21 recall specifically. It's a long time 22 ago. 23 Q Okay. It was a long time ago. 24 We are talking about July, right?</p>	<p style="text-align: right;">Page 1691</p> <p>1 that makes a difference. I think you are 2 still on the same wavelength that I 3 sustained the objection to a while ago. 4 MR. SHEFFLER: Okay, your Honor. 5 BY MR. SHEFFLER: 6 Q Now, have you reviewed the 7 deposition transcript or had any 8 discussions with Mr. Scruggs about the 9 deposition? 10 A No. 11 Q Never talked about it at all 12 with him? 13 A No. 14 Q Or anybody from his firm? 15 A No. 16 Q Sir, have you had any media 17 contacts since this last deposition? 18 A Have I had any media contacts 19 since this last deposition? Yes. 20 Q In those media contacts, sir, 21 have you had any discussions about the 22 deposition? 23 A No. 24 Q Have you ever discussed in the</p>
<p style="text-align: right;">Page 1690</p> <p>1 A Yes. 2 Q During these discussions you had 3 with Mr. Motley at dinner, tobacco never 4 came up? 5 A Not that I can recall. 6 Q Okay. Why was Mr. Motley here 7 in Louisville during that time period? 8 A You will have to ask Mr. Motley 9 that question. 10 Q You have no idea? 11 A He was here as my personal 12 attorney. 13 Q What personal matters was he 14 representing you on then, because you told 15 us there was no matters that Mr. Motley 16 was representing you on except future 17 litigation? 18 MR. ALDOCK: Objection. 19 Objection, we have established that he has 20 retained Mr. Motley within the year and he 21 is referring to that matter. 22 MR. SHEFFLER: Your Honor, his 23 testimony was it was future litigation. 24 THE COURT: I don't see where</p>	<p style="text-align: right;">Page 1692</p> <p>1 media contacts you have now -- since the 2 last time we were together at deposition, 3 have you ever discussed issues relating to 4 B & W, Brown & Williamson? 5 A Issues with the media? Not that 6 I can recall. 7 Q Not that you can recall? 8 A Specific to this litigation, no. 9 Q No, no, no. Specific to B & W, 10 Brown & Williamson Tobacco Company, have 11 you had any discussions with anyone from 12 the media with respect to Brown & 13 Williamson or your employment by Brown & 14 Williamson? 15 A Other than general background 16 information, no. 17 Q The general background 18 information about Brown & Williamson or 19 your employment at Brown & Williamson that 20 you had with the media, when did those 21 discussions occur? 22 A I can't recall. 23 Q How many were there? 24 A I can't recall.</p>

<p style="text-align: right;">Page 1693</p> <p>1 Q. You can't recall how many times 2 you have talked with the media about Brown 3 & Williamson or your employment at Brown & 4 Williamson since July? 5 A. I can't recall, no. 6 Q. Is it safe to say, sir, that 7 there were more than one? 8 A. There could be, I don't recall. 9 Q. Okay. Could there be as many as 10 12? 11 A. I can't recall. 12 Q. So there could be? 13 A. I don't think so, but I don't 14 recall. 15 Q. What's your best estimate of the 16 number of times you have discussed issues 17 relating to Brown & Williamson or Brown & 18 Williamson's employment of you since your 19 last deposition? 20 A. I cannot recall nor can I give 21 you a quantitative number. 22 Q. Who did you have these contacts 23 with; who were the people, what did they 24 represent, what media did you have the</p>	<p style="text-align: right;">Page 1695</p> <p>1 Q. Let's start with that. Did you 2 have discussions with the BBC? 3 A. On my personal life, yes. 4 Q. Did any of that relate to your 5 employment at Brown & Williamson? 6 A. You will have to ask them, I 7 don't know; it probably did. 8 Q. We'll have to ask them? Sir, 9 you were party to the discussions, why do 10 we have to ask them? 11 A. It's my personal life. I can 12 discuss with anybody my personal life. 13 Q. Your personal life, sir, 14 includes your employment at Brown & 15 Williamson. I'm asking you, did you 16 discuss anything about your employment at 17 Brown & Williamson, your relationship with 18 Brown & Williamson or Brown and Williamson 19 with the BBC? 20 A. Use the word Brown & Williamson? 21 Q. Can you answer my question? I 22 am asking you, did you use the word Brown 23 & Williamson? 24 A. Probably did.</p>
<p style="text-align: right;">Page 1694</p> <p>1 contacts with? 2 A. I only can recall discussing 3 general information when I came to Brown & 4 Williamson and what's in the public domain 5 as recently as a month ago with the 6 Indianapolis Star. 7 Q. Okay. Anything else? 8 A. Not that I can recall. 9 Q. You would recall, of course, if 10 you flew over to England to talk to BBC? 11 A. I would, probably. 12 Q. Did you go to England to talk to 13 BBC? 14 A. No, I did not. 15 Q. Were you filmed for a BBC 16 broadcast since your last deposition? 17 A. I believe I was, yes. 18 Q. So you had discussions with BBC? 19 MR. ALDOCK: Objection; 20 discussions relevant to what? 21 MR. SHEFFLER: We will start 22 there. He couldn't recall -- he couldn't 23 recall having discussions with anybody. 24 MR. ALDOCK: About B & W?</p>	<p style="text-align: right;">Page 1696</p> <p>1 Q. Did you discuss your employment 2 at Brown & Williamson with the BBC? 3 A. From the time I was employed to 4 the time I left, yes. I probably said I 5 was employed by Brown & Williamson from 6 January 1989 through March of 1993. 7 Q. Did you say anything else about 8 that employment? 9 A. I can't recall. 10 Q. Did you talk about the tobacco 11 industry? 12 A. I may have talked about the 13 tobacco industry, yes. 14 Q. Including Brown & Williamson? 15 A. I may have. 16 Q. Did you say anything disparaging 17 about the tobacco industry, tobacco, or 18 the tobacco products manufactured and sold 19 by Brown & Williamson? 20 A. I don't believe so. I spoke the 21 truth. 22 Q. You spoke the truth. Sir, let 23 me ask you this, this is something that 24 confused me at the last time. In your</p>

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<p style="text-align: right;">Page 1697</p> <p>1 view, would a disparaging statement have 2 to be an untrue one? 3 MR. ALDOCK: Are you talking 4 for a legal interpretation? 5 MR. SHEFFLER: No, in his view. 6 He is not a lawyer so I'm asking him his 7 view. 8 THE WITNESS: Would a 9 disparaging statement have to be true? I 10 would think it would have to be truth. 11 The statement would have to be truth, I 12 can't equate the both together. 13 Q. Let me ask you the question a 14 little different way. What do you mean -- 15 what do you think the word disparage 16 means? 17 A. To belittle. 18 Q. If you belittled somebody, does 19 that necessarily mean that you are saying 20 something that's untrue about them? In 21 your view? 22 A. I don't think I belittle anybody. 23 Q. Okay. Let me ask the question 24 again, sir. Do you believe that a</p>	<p style="text-align: right;">Page 1699</p> <p>1 society? 2 A. Not that I can recall. 3 Q. Sir, you recall the broadcast on 4 CBS 60 Minutes that you were involved in? 5 A. Um-hum. 6 Q. Do you recall saying anything 7 there that in your opinion reflected 8 negatively on Brown & Williamson? 9 A. Reflected negatively? Yes. 10 Q. Okay. Disparaged Brown & 11 Williamson? 12 A. I don't know if it's 13 disparaging; it reflected negatively, yes. 14 Q. What's the difference? 15 A. It's the truth. 16 Q. You just told me disparagement 17 doesn't have to be untrue. What's the 18 difference? 19 A. I spoke the truth on CBS 60 20 Minutes. If they want to take it as 21 disparaging or not that's their problem. 22 Q. Whether you spoke the truth or 23 not is not my question. Did you say 24 anything on 60 Minutes that according to</p>
<p style="text-align: right;">Page 1698</p> <p>1 statement, a disparaging statement as you 2 understand what a disparaging statement 3 is, do you believe that that statement has 4 to be untrue? 5 A. It could or could not be. 6 Q. So you could disparage somebody 7 by saying things about them that were 8 maybe, in fact, true? 9 A. I have not disparaged anybody. 10 Q. Okay. You have never disparaged 11 Brown & Williamson? 12 A. I don't believe so. 13 Q. Have you ever said anything 14 negative about Brown & Williamson? 15 A. Have I said anything negative in 16 the context of what? 17 Q. In the context of Brown & 18 Williamson. Have you ever said anything 19 that was negative about Brown & Williamson? 20 A. Not that I can recall. 21 Q. Okay. You don't recall ever 22 saying anything that would impugn the 23 reputation of Brown & Williamson as a 24 responsible corporation in American</p>	<p style="text-align: right;">Page 1700</p> <p>1 your interpretation of disparagement was 2 disparaging? 3 A. I didn't make any disparaging 4 comments. 5 Q. Okay. Did you make any negative 6 comments on 60 Minutes about Brown & 7 Williamson? 8 A. I may have made negative 9 comments, yes. 10 Q. Okay. What's the difference 11 between a negative comment and a 12 disparaging comment? 13 A. I don't know. You have the 14 dictionary in front of you, look it up. 15 Q. I'm asking for your 16 understanding. 17 A. They do not equate in my mind. 18 Q. Good. Tell me the difference. 19 A. I didn't belittle Brown & 20 Williamson. I spoke the truth and if the 21 truth is negative, so be it. 22 Q. If I understand, you can say 23 negative comments about Brown & Williamson 24 that may not be disparaging?</p>

<p>Page 1701</p> <p>1 A. Just the same way you make 2 comments about me. 3 Q. Sir, you have got to answer my 4 questions. Under your interpretation of 5 the words "negative comments" and 6 "disparaging", you can make negative 7 comments without being disparaging; is 8 that your understanding? 9 A. I believe you can, yes. 10 Q. Okay. All right. Now, let's 11 get back to these contacts you had after 12 the last deposition. Have you ever spoken 13 to anybody other than the Indiana Star and 14 the BBC about Brown & Williamson and your 15 employment at Brown & Williamson? 16 A. I guess we can add BBC to that. 17 I don't think that's BBC. I think it 18 was -- let's put it in the context of BBC. 19 yes. 20 Q. It was shown on BBC, right? 21 A. I haven't seen it. 22 Q. Okay. In this -- Dispatches, 23 does that ring a bell? Was a program that 24 the media --</p>	<p>Page 1703</p> <p>1 A. What do you mean by anybody 2 else? 3 Q. Well, I don't know. Was Mr. 4 Scruggs there? 5 A. Not that I know of, no. 6 Q. You would have known if he was, 7 wouldn't you? 8 A. Probably. 9 Q. So he wasn't there? 10 A. He was not there, yeah. 11 Q. Was there anybody else there 12 other than the people that should be in 13 school at the time, students and teachers, 14 faculty, the BBC interviewer and you? 15 A. I believe there was film people 16 there or camera people, yes. 17 Q. Anyone else? 18 A. Not that I recall, no. 19 Q. Now, have you had any contacts 20 with anybody from CBS since the last 21 deposition? 22 A. Any contacts with anybody from 23 CBS since the last deposition? Yes. 24 Q. Who?</p>
<p>Page 1702</p> <p>1 A. I don't know. 2 Q. During this interview you had 3 with people from the BBC, other than 4 telling them the dates of your employment 5 what else did you say about Brown & 6 Williamson or tobacco or your employment 7 at Brown & Williamson? 8 A. I can't recall at this time. 9 Q. How long an interview was it? 10 A. I was interviewed at school. 11 Q. How long was it? 12 A. Ten minutes, five minutes, half 13 hour, they were filming me at school. 14 Q. They filmed you during the 15 school day? 16 A. Yes. 17 Q. Was anybody else with you? 18 A. What do you mean? 19 Q. Was anybody else with you on the 20 interview other than the person 21 interviewing? 22 A. There was students around and 23 there was a classroom. 24 Q. Anyone else?</p>	<p>Page 1704</p> <p>1 A. Mr. Lowell Bergman. 2 Q. When was that? 3 A. He called me to see how I was 4 feeling and how things were going. 5 Q. How long did that conversation 6 last? 7 A. 30 seconds, 15 seconds. 8 Q. Did you say anything about B & W? 9 A. No. 10 Q. Is that the only conversation 11 you have had with anybody from CBS? 12 A. I believe so. 13 Q. Okay. Have you had any contacts 14 or discussions with Miss Brenner since 15 your last deposition? 16 A. No. 17 Q. Anyone associated with her? 18 A. No. 19 Q. Have you made any public 20 statements since your last deposition 21 about this case? 22 A. No -- 23 MR. ALDOCK: Counsel, I would 24 like -- with counsel's permission I would</p>

<p style="text-align: right;">Page 1705</p> <p>1 like to refresh the witness's recollection 2 of one other contacts that preceded your 3 last question, if you would like. 4 MR. SHEFFLER: CBS? 5 MR. ALDOCK: Yes. 6 MR. SHEFFLER: Okay. 7 MR. ALDOCK: Go ahead. 8 (Discussion held off the 9 record.) 10 Q. Is your recollection is 11 refreshed? 12 A. Yes. 13 Q. I understand, July is a long 14 time ago. Go ahead, tell us about the 15 other contact. 16 A. I had a conversation with Rich 17 Bonin of 60 Minutes. 18 Q. Who is Rich Bonin? 19 A. He is a producer of 60 Minutes. 20 Q. When did that occur? 21 A. Sometime in -- within the last 22 month or so, month and a half. 23 Q. Okay. And where was that? 24 A. In Washington, D.C.</p>	<p style="text-align: right;">Page 1707</p> <p>1 me what it was. 2 A. I just refreshed my memory. I 3 hadn't thought about it. 4 Q. All right. 5 A. You got all the answers all the 6 time? 7 Q. No, I certainly don't, not from 8 you. Now, let's go on. He wants you to 9 go back on 60 Minutes to talk about the 10 FDA and tobacco? 11 A. Um-hum. 12 Q. And what was your response? 13 A. No. 14 Q. You said no? 15 A. No. 16 Q. And why? 17 A. No. Because -- 18 Q. Why did you say no? 19 A. Because it would be a violation 20 of the court order. 21 Q. Okay. If there wasn't any TRO, 22 would you agree to go back on? If there 23 wasn't any court order, would you agree to 24 go back on?</p>
<p style="text-align: right;">Page 1706</p> <p>1 Q. Okay. And what was the 2 occasion? I mean, why was -- why were 3 you there and why was he there? 4 A. I was there on a legal matter 5 and he happened to ask if he could meet 6 with me with my attorneys present. 7 Q. All right. And what was the 8 discussion about? 9 A. He asked me if I would be 10 willing to consider going back on 60 11 Minutes. 12 Q. Okay. And did he tell you what 13 he wanted to talk to you about on 60 14 Minutes? 15 A. No, he didn't. 16 Q. You did ask him, of course? 17 A. Yes. 18 Q. What was his response? 19 A. They were doing a segment on the 20 FDA and they asked me if I would like to 21 participate and I told him no. 22 Q. Mr. Wigand, I asked you if he 23 told you what they wanted you to talk 24 about and you said no. Now you just told</p>	<p style="text-align: right;">Page 1708</p> <p>1 A. No. 2 Q. Why? 3 A. Because it wasn't in my best 4 interest. 5 Q. Would it be in your view wrong 6 for you to go back on 60 Minutes and talk 7 about tobacco, FDA and Brown & Williamson 8 in light of the agreements that you have 9 signed with Brown & Williamson? 10 A. No. 11 Q. Okay. So the agreements 12 wouldn't have prohibited you but the court 13 order would have prohibited you in Jeffrey 14 Wigand's -- 15 A. My agreement does not prevent me 16 from talking to the media about issues 17 associated with public health and safety. 18 I think we have gone through this a lots 19 of times. 20 Q. I am just trying to get specific 21 here. You see that the court order does 22 prohibit you in ways that your agreement 23 does not; is that correct? 24 A. The court order was a temporary</p>

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<p style="text-align: right;">Page 1709</p> <p>1 method to keep me from talking to the 2 media, yes. 3 Q. Just answer my question. Does 4 the court order prohibit or limit your 5 discussions with the media in a way 6 separate and different from your 7 agreements? 8 A. No, not really. But I respected 9 it at that point. 10 Q. Does the court order, sir, your 11 respect of the court order, okay, is it 12 different than the respect you afford to 13 your confidentiality agreements? 14 A. I think they are one and the 15 same, yes. 16 Q. You think they are one and the 17 same, yes or no? 18 A. I think the intent of my 19 agreement is going to be binding and I 20 believe that my agreement in certain 21 aspects is binding. I have lived up to 22 the intent my agreement. I have not 23 violated my confidentiality agreement 24 whatsoever.</p>	<p style="text-align: right;">Page 1711</p> <p>1 about, say it again? 2 A. Tobacco and the FDA and my role 3 in talking with the FDA. 4 Q. Of course you realize that the 5 court order restrains you from using any 6 information you gathered while you were at 7 Brown & Williamson? 8 A. Yes. 9 Q. Okay. And you can't talk to the 10 media about that, right? 11 A. Yes. 12 Q. Now, when you told -- who was it 13 again, Borman? Bowman? 14 MS. WERTHEIMER: Bonin. 15 MR. SHEFFLER: How do you spell 16 that? 17 MS. WERTHEIMER: B-O-N-I-N. 18 BY MR. SHEFFLER: 19 Q. Rich Bonin wants you to talk 20 about the FDA and its proposed regulation 21 of tobacco, right? 22 A. Yes. 23 Q. Did he want you to talk about 24 ammonia and the use of tobacco?</p>
<p style="text-align: right;">Page 1710</p> <p>1 Q. Let me just see if I -- 2 A. If I went on 60 Minutes again I 3 probably would have not violated my 4 confidentiality agreement. 5 Q. But you would have violated the 6 court order as you understand it? 7 MR. ALDOCK: Objection; he 8 didn't say that. 9 Q. Let me ask you, do you believe 10 that the court order restrains you from 11 going on 60 Minutes and talking about 12 Brown & Williamson's tobacco products and 13 the FDA and its regulation of tobacco? 14 A. I don't think the court order 15 prevents me from talking about the FDA's 16 regulation of tobacco. 17 Q. My question is broader, please 18 answer my question. 60 Minutes wanted to 19 talk to you about tobacco, tobacco 20 products, Brown & Williamson's tobacco 21 products? 22 A. No, sir, it did not. I didn't 23 say that. 24 Q. Why did they want to talk to you</p>	<p style="text-align: right;">Page 1712</p> <p>1 A. We never got to that. 2 Q. Okay. Well, how far did it get? 3 A. No. 4 Q. How far did it get? How much 5 did he tell you besides the FDA and a 6 regulation of tobacco? 7 A. Nothing, the answer was no, no, 8 and no. 9 Q. You believe that the temporary 10 restraining order, the court order in this 11 case, you believe that that restrains you 12 from talking to 60 Minutes? 13 A. That could have been one of the 14 factors. 15 Q. But your confidentiality 16 agreements would not restrain you from 17 talking to 60 Minutes? 18 A. No, they would not have. 19 Q. So that temporary restraining 20 order is different in its scope of what 21 Jeffrey Wigand can or can't do than your 22 confidentiality agreements are in your 23 opinion? 24 A. I think the restraining order</p>

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<p>Page 1713</p> <p>1 specifically says disparaging comments 2 about Brown & Williamson. 3 Q. And as disparaging comments you 4 understand you cannot, under the temporary 5 restraining order, make such comments to 6 60 Minutes or anybody else? 7 A. Nor have I made any. 8 Q. But your confidentiality 9 agreement does not prohibit you from doing 10 that? 11 A. Doing what? 12 Q. Making disparaging comments. 13 MR. ALDOCK: Your Honor, I have 14 let this go for quite a while. It seems 15 to me it's trenching on questions of law 16 and questions of advice of his counsel as 17 to the difference between those agreements 18 and what they mean, and his understandings 19 have got to come in large part through 20 confidential conversations with counsel. 21 I think he is getting duplicative at this 22 point and I would like to now raise an 23 objection. 24 MR. SHEFFLER: If I may</p>	<p>Page 1715</p> <p>1 because he didn't see it as something that 2 may really be a violation or something 3 that he was constrained against doing 4 under his confidentiality agreement. And 5 if Mr. Wigand is going to go around and 6 proselytize his views in violation of the 7 agreement, whether he does it wittingly or 8 unwittingly or whether he does it on the 9 advice of counsel or not we have got to 10 know. 11 The only way I can find out 12 whether he intends to do this any further 13 and whether we need this preliminary 14 injunction and this permanent injunction 15 in place because of confidentiality 16 agreements are not sufficient is to find 17 out what he believes those things control 18 him in doing. 19 THE COURT: To that extent your 20 questions are proper. But there is an 21 issue of law involved. A contract and a 22 court order do not necessarily have to 23 mean the same thing. The court could be 24 wrong in its injunction, it could go</p>
<p>Page 1714</p> <p>1 respond? 2 THE COURT: Go ahead. 3 MR. SHEFFLER: I really am not 4 probing what Mr. Wigand may have talked 5 about his agreements with the validity or 6 the non-validity of them or anything else 7 with his counsel. I really don't care 8 about that. What I am concerned about 9 your Honor is continuing breaches. And 10 one of the issues in this case is whether 11 or not Mr. Wigand breached his contract, 12 whether he did it knowingly or 13 unknowingly, wittingly or unwittingly, 14 intentionally or unintentionally. 15 The issue I need to understand 16 is what does he understand was the 17 boundaries of his contract. Because he may 18 have had, may have made conversations, for 19 example, today he told us all of his media 20 contacts; he forgot about CBS. It wasn't 21 a big event; it was only a month ago but 22 he had forgotten about it until counsel 23 reminded him. 24 The reason was, potentially, is</p>	<p>Page 1716</p> <p>1 beyond, it may not contain everything the 2 contract contains or it may go beyond it. 3 MR. SHEFFLER: That's right. 4 THE COURT: The reasons for a 5 violation of the two, if there is any 6 violation, is considerably different. At 7 least in Kentucky, there is a case that 8 says you have a legal right to breach a 9 contract, all you have to do is pay the 10 damages if you are wrong. But advice of 11 counsel wouldn't be a defense to that but 12 advice of counsel would be a defense in 13 some instances to a violation of a court 14 order. They are just two different 15 animals altogether. 16 MR. SHEFFLER: I understand that, 17 your Honor, that's why I'm not really 18 seeking whether he believes that on advice 19 of counsel or otherwise, that he was in 20 his right to breach -- 21 THE COURT: At times your 22 question seems to center on a distinction 23 in his mind between a court order and a 24 contract and to that extent it's an issue</p>

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<p style="text-align: right;">Page 1717</p> <p>1 of law, and --</p> <p>2 MR. SHEFFLER: Your Honor, here</p> <p>3 is my dilemma and maybe I will take your</p> <p>4 guidance in how to approach it. If Mr.</p> <p>5 Wigand believes that he can't do certain</p> <p>6 things because a court order is in place,</p> <p>7 but he believes he can do them if it</p> <p>8 wasn't in place, even though the contract</p> <p>9 is in place. I just need to find out why.</p> <p>10 THE COURT: I think He said that</p> <p>11 to a certain extent.</p> <p>12 MR. SHEFFLER: He did, he</p> <p>13 certainly said that. All I am trying to</p> <p>14 find out is why. Is it because a court</p> <p>15 order is different in scope or is it</p> <p>16 because it's ordered by the court and not</p> <p>17 a private agreement? That's basically</p> <p>18 what I am trying to see here.</p> <p>19 THE COURT: On the alleged</p> <p>20 breach of the contract. That could be a</p> <p>21 issue of law also. I mean that's going to</p> <p>22 be hotly argued as I understand it as to</p> <p>23 whether a person does have a public policy</p> <p>24 right to breach a contract.</p>	<p style="text-align: right;">Page 1719</p> <p>1 and he thinks it would be okay for him to</p> <p>2 do so, in light of the contracts without</p> <p>3 the court order.</p> <p>4 THE COURT: You may ask that</p> <p>5 specific question and see if his answer</p> <p>6 would have been different if there was no</p> <p>7 court order.</p> <p>8 MR. SHEFFLER: I think we did</p> <p>9 ask that.</p> <p>10 MR. ALDOCK: And you got the</p> <p>11 answer no, it wasn't in his best interest.</p> <p>12 MR. SHEFFLER: It wasn't in his</p> <p>13 best interest, but when we pursued that</p> <p>14 further it seems that Mr. Wigand was</p> <p>15 saying that his contract, it wasn't a</p> <p>16 violation for him to disparage Brown &</p> <p>17 Williamson. Let me just ask it that way.</p> <p>18 What I'm trying to get at, your</p> <p>19 Honor, is very simple. Mr. Wigand has</p> <p>20 made comments repeatedly that what he said</p> <p>21 on 60 Minutes wasn't disparaging of Brown</p> <p>22 & Williamson, it wasn't in violation of</p> <p>23 his contract. And I just need to explore</p> <p>24 what he thinks is disparaging and what he</p>
<p style="text-align: right;">Page 1718</p> <p>1 MR. SHEFFLER: That's what I am</p> <p>2 trying to get at, your Honor.</p> <p>3 THE COURT: Isn't that an issue</p> <p>4 of law?</p> <p>5 MR. SHEFFLER: It is an issue of</p> <p>6 law, whether he has the right. It's not</p> <p>7 an issue of law as to whether that that's</p> <p>8 why he is breaching it because he believes</p> <p>9 it is his intent that this contract would</p> <p>10 bind him but that he is free to say things</p> <p>11 that are in the public health interest</p> <p>12 despite it. If that's the claim that he</p> <p>13 is making, not his lawyers but him, then I</p> <p>14 will explore that.</p> <p>15 MR. ALDOCK: Your Honor, the only</p> <p>16 matter we have been exploring here is the</p> <p>17 contacts with Mr. Bonin at CBS in which he</p> <p>18 asked to go on a TV show and he said no.</p> <p>19 He hasn't established any breach in</p> <p>20 connection with that.</p> <p>21 MR. SHEFFLER: The point your</p> <p>22 Honor is that he said no because there is</p> <p>23 a court order. He wouldn't have said no,</p> <p>24 he didn't think it would be in violation</p>	<p style="text-align: right;">Page 1720</p> <p>1 is thinks is a violation because otherwise</p> <p>2 I don't really know what his claims are</p> <p>3 going to be at this trial.</p> <p>4 If it's merely a matter of he is</p> <p>5 claiming that he has a public policy right</p> <p>6 to ignore his contract that's one thing,</p> <p>7 and we can deal with that. If it's an</p> <p>8 idea of what the interpretation of the</p> <p>9 contract is, that's something totally</p> <p>10 different and I need to explore that.</p> <p>11 THE COURT: I'm not well enough</p> <p>12 versed in the contract between Dr. Wigand</p> <p>13 and Brown & Williamson. Does it say</p> <p>14 anything about disparaging remarks? As I</p> <p>15 understand it the injunction, the</p> <p>16 restraining order does, it says don't make</p> <p>17 disparaging remarks about Brown &</p> <p>18 Williamson.</p> <p>19 I would suspect that the</p> <p>20 contract doesn't contain language about --</p> <p>21 it's more attuned to trade secrets I would</p> <p>22 assume and not disparaging remarks.</p> <p>23 MR. SHEFFLER: Mr. Wigand is</p> <p>24 nodding his head. Let me ask him that</p>

<p style="text-align: right;">Page 1721</p> <p>1 question. 2 BY MR. SHEFFLER: 3 Q. In your recollection, sir, does 4 the contract say anything about 5 disparaging information? 6 MR. ALDOCK: Objection, the 7 contract speaks for itself, he doesn't 8 have it in front of him. Now we really 9 are getting into -- 10 MR. SHEFFLER: Your Honor, here 11 is the problem, the contract certainly 12 does speak for itself and I'm not going to 13 establish the contract's language through 14 Mr. Wigand but I certainly can establish 15 whether Mr. Wigand is aware enough of the 16 contract to have made had a decision when 17 somebody approaches him from the media as 18 to what he can say or can't say. 19 That goes -- I'm probing Mr. 20 Wigand's state of mind and intent not the 21 legal validity of the contract, not the 22 precise words of the contract, but what he 23 understands the contract to be, what he 24 understands the contract to restrict.</p>	<p style="text-align: right;">Page 1723</p> <p>1 A. That I couldn't discuss Brown & 2 Williamson's trade secrets. This matter 3 that Mr. Bonin approached me for had 4 absolutely nothing to do with Brown & 5 Williamson. 6 Q. Trade secrets? 7 A. Or information acquired during 8 my employment at Brown & Williamson. 9 Q. Sir, let me get one step 10 further. You understand that Mr. Bonin 11 wanted you to talk about tobacco in 12 general? 13 A. I can talk about tobacco in 14 general anytime I want. 15 Q. Can you say disparaging things 16 about a tobacco company such as Brown & 17 Williamson? 18 A. I didn't say anything 19 disparaging about Brown & Williamson. 20 Q. I know you didn't, you told Mr. 21 Bonin you couldn't talk to him at all 22 bought because of the TRO. 23 A. I didn't say that. 24 Q. You said no, you wouldn't talk</p>
<p style="text-align: right;">Page 1722</p> <p>1 That I think, I am entitled to prove not 2 only to establish breach but also to 3 establish punitive damages for the breach 4 if he was doing it willfully and with 5 flagrant disregard of someone's rights. 6 I think I have a right to 7 establish his intent on this. The only 8 way I can do that is to know what his 9 intent was. 10 THE COURT: All right. To that 11 extent you may ask. 12 Q. Okay. Sir, does the contract -- 13 in your recollection of it, does the 14 contract address the issue of disparaging 15 comments or negative comments about Brown 16 & Williamson? 17 A. I would have to look at the 18 contract and refresh my memory. 19 Q. Well, I understand that your 20 memory may not be consistent with the 21 contract, but when you were discussing 22 this with Mr. Bonin, what was your 23 understanding of the contract at that 24 time?</p>	<p style="text-align: right;">Page 1724</p> <p>1 to him? 2 A. I didn't want to talk to him. 3 Q. Let me ask you sir, does your 4 contract, in your mind, prevent you from 5 saying negative things about Brown & 6 Williamson? 7 A. Does not prevent me from telling 8 the truth about Brown & Williamson. 9 Q. Even if the truth in Jeffrey 10 Wigand's view is negative? 11 A. If the truth is negative, so be 12 it the. If the truth is positive, so be 13 it, it's the truth. 14 Q. The same way you could say 15 negative things that are disparaging if 16 they are truthful about Brown & Williamson? 17 A. That's the interpretation of 18 those who are interpreting the comments. 19 Q. I'm not asking you for them. 20 I'm asking for you, your intent at the 21 time you got up in the 60 Minutes CBS 22 broadcast with Mike Wallace, at that time, 23 okay, what was your understanding? 24 A. Tell the truth, public health</p>

<p style="text-align: right;">Page 1725</p> <p>1 and safety.</p> <p>2 Q. Okay. Fine, I understand that</p> <p>3 you said that before. Let me ask you</p> <p>4 this, even if those comments were</p> <p>5 disparaging or negative about Brown &</p> <p>6 Williamson, you believe that you could say</p> <p>7 them?</p> <p>8 A. Sometimes the truth is negative,</p> <p>9 whether it's disparaging or not, I don't</p> <p>10 know.</p> <p>11 Q. Well, okay. If it were</p> <p>12 disparaging?</p> <p>13 A. What's disparaging mean.</p> <p>14 Q. Belittle.</p> <p>15 A. I don't think I belittled Brown</p> <p>16 & Williamson.</p> <p>17 Q. Pardon me?</p> <p>18 A. I did not belittle Brown &</p> <p>19 Williamson.</p> <p>20 Q. Did you ever belittle anybody</p> <p>21 who worked at Brown & Williamson?</p> <p>22 A. Did I ever belittle, I don't</p> <p>23 know that. Did I ever?</p> <p>24 Q. Have you rebelittled since you</p>	<p style="text-align: right;">Page 1727</p> <p>1 think it's the truth or not. Is it a</p> <p>2 'disparaging comment'?</p> <p>3 A. I don't know whether it's</p> <p>4 disparaging or not, it's the truth.</p> <p>5 Q. You don't know whether or not</p> <p>6 comments that you have made about Mr.</p> <p>7 Sandefur by calling him a liar was a</p> <p>8 disparaging or negative excellent about a</p> <p>9 Brown & Williamson employee, is that what</p> <p>10 your testimony is?</p> <p>11 A. It was a negative comment and it</p> <p>12 was the truth.</p> <p>13 Q. Okay, sir. Let me ask you this,</p> <p>14 do you think it is a disparaging comment</p> <p>15 to say that Brown & Williamson knowingly</p> <p>16 put a carcinogenic agent that was a lung</p> <p>17 and human specific carcinogen in its</p> <p>18 tobacco products? Do you think it's a</p> <p>19 disparaging statement?</p> <p>20 A. It's the truth.</p> <p>21 Q. I didn't ask you whether you</p> <p>22 think it was the truth.</p> <p>23 A. Depends who looks at it. I</p> <p>24 think a lot of people would view that as</p>
<p style="text-align: right;">Page 1726</p> <p>1 were fired former employees of Brown &</p> <p>2 Williamson?</p> <p>3 A. Not to my recollection.</p> <p>4 Q. If you call somebody a liar,</p> <p>5 sir, is that belittling?</p> <p>6 A. If it's true, I don't know, is</p> <p>7 it, have I called somebody a liar?</p> <p>8 Q. Sir, let me ask you the</p> <p>9 question.</p> <p>10 A. Have I called somebody a liar?</p> <p>11 Q. You can't ask me questions,</p> <p>12 that's not the way it works, this works by</p> <p>13 me asking you, okay?</p> <p>14 A. My turn will come.</p> <p>15 Q. Sir, let me ask you this</p> <p>16 question, have you ever called an employee</p> <p>17 of Brown & Williamson a liar?</p> <p>18 A. Mr. Sandefur lied in front of</p> <p>19 Congress, yes.</p> <p>20 Q. Calling somebody a liar or</p> <p>21 saying somebody lied, is that a</p> <p>22 disparaging comment about them?</p> <p>23 A. That's the truth.</p> <p>24 Q. I didn't ask you whether you</p>	<p style="text-align: right;">Page 1728</p> <p>1 the truth.</p> <p>2 Q. I don't care whether they think</p> <p>3 it's true or not. We are talking about</p> <p>4 something totally different. We are</p> <p>5 talking about disparaging and what</p> <p>6 disparaging means.</p> <p>7 A. I don't know whether it's</p> <p>8 disparaging or not.</p> <p>9 Q. What could you say about Brown &</p> <p>10 Williamson that was disparaging?</p> <p>11 A. I haven't said anything</p> <p>12 disparaging about Brown & Williamson that</p> <p>13 was disparaged go.</p> <p>14 Q. What could you say? Give me an</p> <p>15 example of what a disparaging --</p> <p>16 A. I don't have an example.</p> <p>17 Q. You don't know what the term</p> <p>18 means in terms of Brown & Williamson?</p> <p>19 A. I didn't say that. I said</p> <p>20 belittling is disparaging.</p> <p>21 Q. Have you ever belittled the</p> <p>22 reputation of Brown & Williamson?</p> <p>23 A. Not to my recollection, no.</p> <p>24 Q. In anything you said on 60</p>

<p style="text-align: right;">Page 1729</p> <p>1 Minutes, you did not belittle the 2 reputation of Brown & Williamson? 3 A. I said the truth on 60 Minutes. 4 Q. Sir? 5 A. If it's negative -- 6 Q. Can you disparage or belittle 7 somebody by saying the truth? 8 A. I don't know, can you? 9 Q. I don't know. If you had secret 10 information about somebody that was not 11 publicly known, okay, if you had secret 12 information about somebody's past that was 13 not publicly known, all right, and yet you 14 broadcast it, would that be disparaging? 15 A. Like you did? 16 Q. Well was it disparaging? 17 A. Was it? It wasn't true, was it? 18 Q. I don't know what you are 19 talking about, but I'm asking the 20 question, is that your position? Is it 21 disparaging to talk about secret 22 information about an individual whether 23 it's truth or not, if the individual finds 24 it to be harmful to him?</p>	<p style="text-align: right;">Page 1731</p> <p>1 THE COURT: Does the contract 2 say anything about not making disparaging 3 remarks? 4 MR. SHEFFLER: Yes, it does. 5 It says you can't make disparaging remarks 6 or make negative comments. 7 BY MR. SHEFFLER: 8 Q. In fact, doesn't the contract 9 say -- I will show it to you, sir. That's 10 Deposition Wigand 6 -- 11 MR. ALDOCK: We have no quarrel 12 with what the language is. The question 13 for litigation is the extent to which it's 14 enforceable, the extent to which -- did he 15 violate it? The extent to which he relied 16 on other advice when he did what he did, 17 and the context we are talking about is 18 the went on -- he was asked by 60 19 Minutes if he would go on a recent show he 20 said no. 21 THE COURT: I'm having 22 difficulty in my mind about defense -- 23 truth being a defense to a disparaging 24 remark. I'm thinking about poor old David</p>
<p style="text-align: right;">Page 1730</p> <p>1 MR. ALDOCK: These are 2 hypothetical questions of law, what are we 3 doing here. 4 MR. SHEFFLER: Your Honor, I'm 5 trying to see what this man's understands 6 disparaging means. We spent a lot of 7 time on this, it's important to the 8 contract and to our action to understand 9 what he thinks he was doing when he was 10 making these statements. 11 It's one thing to get up there 12 and say, on 60 Minutes that I'm former 13 director of R & D and I think tobacco is 14 bad. It's another thing to say I'm the 15 former director of R & D and Brown & 16 Williamson did X, Y and Z and all of that 17 is horrible stuff. 18 If he doesn't think that that's 19 a violation because in his mind he thinks 20 it's true -- 21 THE COURT: Violation of the 22 restraining or order or the contract? 23 MR. SHEFFLER: The contract I'm 24 talking about now.</p>	<p style="text-align: right;">Page 1732</p> <p>1 Brinkley apologizing to the president. 2 MR. SHEFFLER: It was 3 disparaging, it was. 4 THE COURT: It must have been 5 disparaging because he apologized. 6 Whether it was the truth, I'm not going to 7 answer. 8 MR. SHEFFLER: It wasn't the 9 truth. It was the truth in David 10 Brinkley's mind. 11 MR. ALDOCK: The interpretation 12 of those words is the ultimate issues 13 before the court, you are asking a lay 14 witness. 15 MR. SHEFFLER: That's true, I 16 agree with Mr. Aldock in terms of one and 17 three that he mentioned. He mentioned 18 that this was the contract language for 19 interpretation of the court. The ultimate 20 issue is whether there is defenses to it. 21 But the second issue that he 22 mentioned whether he intentionally 23 violated it, and whether he violated it at 24 all in his mind and got up on the stand</p>

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<p style="text-align: right;">Page 1733</p> <p>1 and said those things I think is important 2 for two reasons. 3 Number one, it's important for 4 our cause of action that we have to prove. 5 And it's important in terms of our claims 6 in this case of disparagement and what 7 have you based upon the contract and we 8 may be wrong. 9 You know, the court may say 10 disparaging doesn't mean anything that we 11 say it means. Nevertheless, we have a 12 contract that we interpret one way and I 13 need to get the factual evidence about 14 that from him, about his intent when he 15 read that. 16 Now, if he tells me, your Honor, 17 that I read that and it says disparage, 18 but I ignored it because I have -- I'm 19 on a Holy Grail mission for truth and 20 justice, that's fine. 21 If he tells me, yeah, I read 22 that, but in my mind disparaging means you 23 have to say something that's untrue, and 24 what I was saying was true, then we have</p>	<p style="text-align: right;">Page 1735</p> <p>1 if he also says in his mind a disparaging 2 comment doesn't have to be an untrue one? 3 THE COURT: If he has answered 4 so be it. Whether it holds water or not 5 is for somebody else to answer. 6 BY MR. SHEFFLER: 7 Q. All right. Did you understand, 8 sir, and let me just show you the 9 Deposition Exhibit No. 6 which is your 10 contract and point you to the highlighted 11 information. Maybe you could just read 12 that into the record if you would. 13 A. I will read the highlighted. It 14 says you agree not to make any statements 15 which could disparage the reputation and 16 integrity of Brown & Williamson or its 17 employees, products -- do you agree not 18 to make any statements or communications 19 which could, conditional, disparage the 20 reputation and integrity of Brown & 21 Williamson or its employees or its 22 products or otherwise reflect negatively 23 on Brown & Williamson or its products or 24 interfere with its employees and business</p>
<p style="text-align: right;">Page 1734</p> <p>1 something else. If he says I forgot that 2 it said disparage -- 3 THE COURT: Has he not answered 4 that? 5 MR. ALDOCK: Several times. 6 MR. SHEFFLER: Well, I don't 7 know what his answer is. 8 THE COURT: We could read it 9 back. 10 MR. ALDOCK: You have gotten 11 answers to every one of those questions. 12 MR. SHEFFLER: At one point he 13 said disparage doesn't have to be untrue. 14 MR. ALDOCK: Let's read it 15 back. 16 MR. SHEFFLER: At another 17 point, he said he could make statements on 18 CBS and not disparage them because they 19 were true. I don't know how that jibes. 20 He answered all my questions; I don't 21 agree with that. The question's answers 22 don't hold water. 23 How can he one hand say you can 24 say things true and they are disparaging</p>	<p style="text-align: right;">Page 1736</p> <p>1 relationships. And that's the amendment 2 to the original of November 8th, 1993. 3 Q. Okay. Now, sir let me ask you, 4 in your mind when you got up on 60 Minutes 5 did you have this clause of the contract, 6 did you have this clause of the contract 7 in mind when you were approached by 60 8 Minutes, the original time when Mike 9 Wallace wanted you to talk on his show, 10 did you have this contract in mind at that 11 time? 12 A. I had public health and safety 13 in mind. 14 Q. Did you also have in mind that 15 the contract said that you agree, agree 16 not to make statements or communications 17 which could, not necessarily do, but which 18 could disparage, did you have that in mind? 19 A. I can't recall. 20 Q. Okay. Did you ever consider at 21 that time, we are talking about the Mike 22 Wallace interviews. In fact, let's start 23 off with the first time that Lowell 24 Bergman suggested to you to go on Mike</p>

<p style="text-align: right;">Page 1737</p> <p>1 Wallace's show. During all the meetings 2 you had with CBS and during the all of the 3 things up to now and including the time 4 that you went on CBS, did you ever think 5 to yourself that some of the things you 6 were saying could disparage Brown & 7 Williamson? Did you ever think of that? 8 A. Brown & Williamson may look at 9 it that way, I think the rest of the world 10 would not look at it that way. 11 THE COURT: He is asking you, 12 did you? 13 A. No, I didn't realize it, I 14 didn't think it would negatively reflect, 15 it was the truth. 16 Q. You didn't think that anything 17 you said about Brown & Williamson could 18 disparage its reputation? 19 A. It was the truth, and I told the 20 truth in the interest of public health and 21 safety. If it's disparaging -- 22 Q. I'm sorry, finish. 23 A. Let's go ahead. 24 Q. When you called Tommy Sandefur a</p>	<p style="text-align: right;">Page 1739</p> <p>1 a statement could disparage his reputation 2 or integrity? 3 A. No. 4 Q. You didn't think about it at all? 5 A. No, I thought about the truth. 6 Q. Okay. So you didn't think -- the 7 answer to my question is no, you didn't 8 think about it? 9 A. No, I will qualify that simply 10 by saying it was the truth, he lied to 11 Congress. 12 Q. Sir, that doesn't qualify it. 13 It's additional information; it's 14 nonresponsive; I move to strike. 15 THE COURT: He said five minutes 16 on the tape, I was nodding. 17 MR. ALDOCK: I don't think he 18 was talking to you. 19 MR. SHEFFLER: I move to strike 20 the non-responsive part of his -- 21 MR. ALDOCK: Objection; it was 22 part of his answer. 23 MR. SHEFFLER: Your Honor, let 24 me ask one more question then we will take</p>
<p style="text-align: right;">Page 1738</p> <p>1 liar, did you think that that could 2 disparage his reputation or his integrity, 3 did you consider that? 4 A. It's the truth. 5 Q. But did you consider that it 6 could disparage his reputation and 7 integrity? 8 A. It's the truth. 9 Q. I'm asking you a question. 10 Whether it's true or false is irrelevant 11 to my question, and I'm entitled to ask 12 you and get an answer to my question. 13 Which was when you -- 14 A. I don't know what was in Tommy 15 Sandefur's mind. You'll have to ask him. 16 Q. Listen very carefully to my 17 question. I'm asking for what was in Jeff 18 Wigand's mind. Okay? That's my question. 19 When you called Tommy Sandefur a liar -- 20 and you have done that more than once, 21 haven't you sir? 22 A. I may have, yes. 23 Q. When you called Tommy Sandefur a 24 liar, did you consider whether or not such</p>	<p style="text-align: right;">Page 1740</p> <p>1 our break for the tape. 2 BY MR. SHEFFLER: 3 Q. Did you think that any of the 4 statements that you made to Mike Wallace on 5 60 Minutes reflected negatively on Brown & 6 Williamson or its products? 7 A. If it was the truth and 8 reflected negatively so be it. 9 Q. I'm not asking you sir, if, if, 10 if, if. I'm asking you did you consider 11 whether any of the statements you made on 12 60 Minutes at the time you were making 13 them reflected negatively on Brown & 14 Williamson or its products? 15 A. If it was the truth, it was the 16 truth, I don't know whether it was going 17 to reflect negatively or not. It was the 18 truth. 19 MR. SHEFFLER: Sir, I'm going 20 to press this question, your Honor because 21 I think it's important. 22 THE COURT: Okay. 23 BY MR. SHEFFLER: 24 Q. Did you consider at the time you</p>

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<p>Page 1741</p> <p>1 were making these statements whether or 2 not the comments you were making would 3 reflect negatively on Brown & Williamson 4 or its products? 5 A. No. 6 MR. SHEFFLER: Thank you. All 7 right, Judge, I think if we have to take a 8 break, this might be a good time. 9 THE COURT: Going off the record. 10 (Discussion held off the 11 record.) 12 ----- 13 Thereupon, the deposition was 14 adjourned at 11:45 a.m. 15 ----- 16 17 18 19 20 21 22 23 24</p>	
<p>Page 1742</p> <p>1 CERTIFICATE 2 I, Thomas F. Runfola, a Registered 3 Professional Reporter, do hereby certify 4 that I reported the deposition of Jeffrey S. 5 Wigand, and that the foregoing transcript of 6 such proceedings is a full, true and correct 7 transcript of my stenotypy notes made to the 8 best of my ability. 9 I do further certify that I was called 10 there in the capacity of a Court Reporter, 11 and am not otherwise interested in this 12 proceeding. 13 14 _____ 15 THOMAS F. RUNFOLA, 16 Registered Professional Reporter 17 18 _____ 19 DEANNA S. CURTIN, 20 Registered Professional Reporter 21 Notary Public for the State of Kentucky. 22 My Commission Expires: _____ 23 24</p>	

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BROWN & WILLIAMSON
1994 - 1996 COLLECTION

ARCHIVE VARIANCE FORM

THE NUMBER (Range) 562630422 A is

☐ MISSING

☐ Missing in All Sets

☐ Missing in Closed and Review Sets

☐ DELETED

☐ CHANGED To _____

☐ DELETED and CHANGED To _____

☐ NOT USED

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